Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1999

THE CITY OF CONCORD,
Petitioner,

v.

NEIL S. HARDIN,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Date	Description	Page
	Decisions Of The Courts Below	
10/16/98	Decision of the Ninth Circuit, filed October 16, 1998	A1
7/30/96	Decision of the United States District Court Denying Defendants' Motions for New Trial, filed July 30, 1996	A5
11/10/94	Decision of the United States District Court Denying Defendants' Rule 50 Motions, November 10, 1994	A23
10/6/94	Decision of the United States District Court Denying Defendants' Objections to the Letters, October 6, 1994	A24
9/22/94	Decision of the United States District Court Denying Defendants' Motions In Limine, September 22, 1994	A29
9/20/94	Decision of the United States District Court Denying Defendants' Motions for Summary Judgment, filed September 20, 1994	A30
8/31/94	Decision of the United States District Court, filed August 31, 1994	A45
12/7/98	Decision of the Ninth Circuit Denying Defendant's Petition for Rehearing, filed December 7, 1998	A47
5/8/96	Judgment of the United States District Court, filed May 8, 1996	A48

Date	Description	Page
	Pertinent Record Material	
10/26/95	Mrs. Hardin's Response to Defendant Campbell's Motion in Limine No. 33 to Exclude All Evidence Regarding Letters Critical of Mrs. Hardin other than Stipulation Adopted in Prior Trial	A50
10/26/95	Defendant City's Notice of Joining in Defendant Campbell's Motion in Limine No. 33 to Exclude All Evidence Re Letters Critical of Plaintiff Other Than Stipulation Adopted at Prior Trial	A53
10/18/95	Defendant Campbell's Motion in Limine No. 33 to Exclude All Evidence Regarding Letters Critical of Plaintiff Other Than Stipulation Adopted in Prior Trial	A55
10/17/94	Stipulation Re Letters and Newspaper Articles Critical of Rita Hardin	A60
10/12/94	Objections by Counsel	A63
10/11/94	Motion in Limine Re Admissibility of Testimony Re Plaintiff's Contention that Certain Letters to the Editor Were Fabricated and Evidence of the Relationships Between Campbell and Certain of the Letter Writers	A68
10/5/94	Objections by Counsel	A72
9/9/94	Plaintiff's Opposition to Defendant Campbell's Motions in Limine Nos. 2-5, 11, 12, and 18, and to Defendant City's Motion in Limine No. 8	A77

Date	Description	Page
9/9/94	Defendant City's Notice of Joining in Defendant Campbell's (Eleventh) Motion in Limine to Preclude Use of the Term "Fake Letters," or Synonymous Terminology Absent a Proper Foundational Showing Outside the Presence of the Jury	A81
9/9/94	Defendant City's Notice of Joining in Defendant Campbell's (Twelfth) Motion in Limine to Preclude Use of the Term "Hostile or Negative Letter Writing Campaign," or Synonymous Terminology Absent a Proper Foundational Showing Outside the Presence of the Jury	A83
9/6/94	Motion in Limine to Preclude Use of the Term "Fake Letters," or Synonymous Terminology Absent a Proper Foundational Showing Outside the Presence of the Jury	A85
9/6/94	Motion in Limine to Preclude the Use of the Terms "Hostile or Negative Letter Writing Campaign," or Synonymous Terminology Absent a Proper Foundational Showing Outside the Presence of the Jury	A90
	Pertinent Statutes	
	2 U.S.C. §1202-§1220	A94
	29 U.S.C. §630(f)	A96
	42 U.S.C. §2000e	A97
	Cal. Gov't Code §34851-§36506	A98

Date	Description	Page
	Concord Municipal Code §2206-§11309	A99

DECISION OF THE NINTH CIRCUIT, FILED OCTOBER 16, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEIL S. HARDIN, Administration of Rita Ellen Hardin's estate, Plaintiff-Appellee, v. CITY OF CONCORD, Defendant-Appellant.	No. 96-16213 D.C. NO. CV 93-1297 WHO MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and Submitted September 16, 1998
San Francisco, California

Before: T.G. NELSON, THOMAS and SILVERMAN, Circuit Judges.

The City appeals a $1.2 million jury verdict for Hardin for sexual harassment and retaliation in violation of Title VII, 42 U.S.C. § 2000e, and wrongful constructive discharge. We have jurisdiction pursuant to 28 U.S.C. § 1331

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

and affirm the jury verdict. Because the parties are aware of the facts of this case, we will not recite them in this decision.

The City first argues that the jury verdict should be reversed because Hardin was exempt from coverage of Title VII as a policymaker not covered by civil service laws. See 42 U.S.C. § 2000e(f). When the district court denied the City's motion for summary judgment, the question of whether Hardin was exempt from Title VII's coverage remained an issue for the jury. The City failed to present the issue to the jury in either of its trials or to renew its motion for judgment as a matter of law at the second trial. This court lacks authority to consider the motion for judgment as a matter of law. *See Desrosiers v. Flight Int'l of Florida Inc.*, No. 97-16062, slip op. 10907, 10917 (9th Cir. Sept. 15, 1998) (holding that because the party failed to make a Rule 50(b) motion to the trial court, the court of appeals lacked the power to grant or consider the judgment as a matter of law); *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992) (holding that denial of a motion for summary judgment is not reviewable after a jury has heard the case); *Basciano v. Reinecke*, 313 F.2d 542, 544 (2d Cir. 1963) (holding that ruling on a Rule 50(b) motion for directed verdict from the first trial is not reviewable on appeal from a judgment of the second trial).

The City argues that the district judge erred in granting Hardin's motion for new trial after the first trial because he erroneously relied on evidence of sexual harassment of other employees to find a hostile work environment. We review a grant of a motion for new trial for an abuse of discretion because we defer to the trial court's more intimate knowledge of the case and facts. *California Sansome Co., v. United States Gypsum, Co.*, 55 F.3d 1402, 1405 (9th Cir. 1995). For Hardin to establish a hostile environment, she must prove that the sexual harassment was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Because the

district judge relied on the incidents of other employees only to the extent they impacted on Hardin and the record contains ample evidence of a hostile work environment relevant to her, he did not err in granting the new trial.

The district judge also granted a new trial on Hardin's retaliation claim finding that the jury's conclusion that Hardin failed to engage in protected opposition to the harassment was against the weight of the evidence. To establish retaliation, Hardin must prove that: (1) she engaged in protected activity or opposition; (2) she suffered an adverse employment decision and (3) there was a causal link between her activity and the employment decision. *Trent v. Valley Electric Ass'n*, 41 F.3d 524) 526 (9th Cir. 1994). There is ample evidence in the record of the first trial that Hardin engaged in opposition to the sexual harassment. Thus, the district judge did not abuse his discretion in granting a new trial.

The City argues that the district court erred in instructing the jury regarding its vicarious liability at the second trial. We review the district court's formulation of civil jury instructions as a whole for an abuse of discretion to determine if they are misleading or inadequate. *Abromson v. American Pac. Assurance Co.*, 114 F.3d 898, 902 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998). The jury instructions in this case complied with the law of this circuit regarding vicarious liability of employers in Title VII cases. *See Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). The instructions are also consistent with the Supreme Court's recent opinions in *Burlington Industries, Inc., v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). Thus, the City's claim is without merit.

Finally, the City argues that admission of stipulated evidence regarding bad publicity Hardin alleged that the mayor initiated in retaliation for her exercising her Title VII rights violated the mayor's first amendment political speech rights and prevents its vicarious liability. The City waived

this issue when it stipulated to admission of the evidence and failed to challenge admission of the evidence as a violation of First Amendment freedom of speech. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985) (acknowledging that generally the court will not consider issues raised for the first time on appeal).

Because we affirm the Title VII claims, we need not consider the City's challenge to the wrongful constructive discharge claim based on the supposed invalidity of the Title VII claims.

AFFIRMED.

DECISION OF THE UNITED STATES DISTRICT COURT, FILED JULY 30, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD; BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendant.	No. C-93-1297 WHO MEMORANDUM DECISION AND ORDER

Defendants Byron Campbell ("Campbell") and the City of Concord ("the City") have filed motions seeking a new trial on the grounds of jury instruction error, erroneous evidentiary rulings, and on the ground that the verdicts were against the clear weight of the evidence. In the alternative, the City asks that the damages awarded against it be reduced. For the reasons hereinafter set forth, defendants' motions are denied.

I.

The facts of this case are well known both to the Court and to the parties, so a repetition of them is unnecessary. Instead, a brief procedural history will suffice.

The Court held a six-week jury trial in October and November 1994 on the claims brought by plaintiff Rita Hardin ("Hardin") for sex discrimination, sexual harassment,

retaliation, wrongful constructive termination, breach of contract, breach of the implied covenant of good faith and fair dealing, defamation, and assault and battery. The jury overwhelmingly rejected Hardin's claims, finding in favor of defendants on all but one claim, awarding Hardin $75,000 for breach of the implied covenant of good faith and fair dealing against the City.

Hardin moved for a new trial. On May 3, 1995, the Court granted Hardin's motion for a new trial on her claims of retaliation, hostile work environment, and wrongful constructive termination after concluding that the jury's verdicts an these three claims went against the clear weight of the evidence.

A second jury trial took place in February and March 1996. This time, the jury found in favor of Hardin on all counts and awarded her $1.231 million in damages against the City and $65,000 in damages against Campbell.[1]

II.

Rule 59(a) authorizes the Court to grant a new trial on all or part of a jury trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a).

> [T]he general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair . . . [T]he motion may also raise questions of law arising out of substantial errors in the admission or rejection of

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[1]The breakdown of damages was as follows:

The City:	Economic	$ 631,000
	Noneconomic	600,000
Campbell:	Economic	$ 15,000
	Noneconomic	50,000

> evidence or the giving or refusal of instructions . . . . The court has the power and duty to order a new trial whenever, in its judgment, this action is required in order to prevent injustice.

11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* §2805, at 54-55 (2d ed. 1995) (hereinafter "Wright & Miller").

In addition, the Court is guided by Rule 61 of the Federal Rules of Civil Procedure, in accordance with which "Only those errors that have caused substantial harm to the losing party . . . justify a new trial." Wright & Miller §2805 at 60. Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict . . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61.

A.

Both defendants argue that (1) the jury instruction on hostile work environment was erroneous, (2) the jury instruction defining "adverse employment action" was erroneous, and (3) the Court erred in refusing to instruct the jury that emotional distress caused by the first trial was not recoverable. In addition, the City claims that (1) the jury instructions on agency, supervisor, and scope of authority were erroneous, and (2) the jury instruction on wrongful constructive termination omitted two elements.

On appeal, jury instructions are generally reviewed to determine whether the district court abused its discretion. *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). The proper inquiry is whether the charges as a whole "fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Id.* (citation omitted). "A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented." *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 726 F.2d 1381, 1398 (9th Cir.) (citations omitted), *cert. denied,* 469 U.S. 990 (1984).

An error of law in jury instructions in a civil case requires reversal unless the error is more probably than not harmless. *Caballero v. City of Concord,* 956 F.2d 204, 206 (9th Cir. 1992). An error is harmless if the result would more probably than not have been the same. *Id.* at 207. "In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party." Id. Jury instructions and special verdict forms should be reviewed together to determine whether the jury was misled. *Boggs v. Lewis,* 863 F.2d 662, 666 (9th Cir. 1988).

1.

Both defendants argue that one of the Court's hostile work environment instructions misstated the law of sexual harassment under the California Fair Employment and Housing Act ("FEHA"). In particular, they contend that the wording of the instruction could have allowed the jury to conclude that Hardin was not herself personally subjected to harassment, but that a hostile work environment nevertheless existed due to Hardin's "mere awareness" of Campbell's conduct towards other women in City Hall. This, they con-

tend, would be insufficient to show a hostile work environment as a matter of California law. Defendants, thus, reiterate an argument that was raised and rejected by the Court at trial.

The Court's instruction to the Jury provided that Hardin had to prove that "defendant Campbell's conduct was either directed toward [Hardin] or the conduct was directed toward other employees and [Hardin] was aware of or witnessed the conduct." (Jury Instructions at 26 ¶2.)

Defendants rely on *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 262 Cal. Rptr. 842 (1989). In *Fisher*, the court of appeal reversed the lower court's order, which sustained defendants' demurrers without leave to amend, and directed the lower court to grant the plaintiff leave to amend her complaint. The *Fisher* court agreed with the conclusion that the plaintiff's amended complaint had failed to state a claim for hostile work environment sexual harassment under the FEHA. In her complaint, the plaintiff had alleged sexual harassment of other employees, but had failed to allege either that she was a direct victim of sexual harassment or that she had been personally exposed to the sexual harassment of the other employees. The court explained the pleading requirements as follows:

> [O]ne who is personally subjected to offensive remarks and touchings, can establish a hostile work environment by showing that harassment existed in the place of employment. However, one who is not personally subjected to such remarks or touchings, must establish that she personally witnessed the harassing conduct and that it was in her immediate work environment.

Id. at 610-11, 262 Cal. Rptr. at 853.

In this case, Hardin falls within the former category because she alleged in her complaint, and presented evidence at trial, that she was "personally subjected to offensive remarks and touchings" by Campbell. *Id.* at 610-11, 262 Cal. Rptr. at 853. Therefore, under *Fisher*, Hardin was enti-

tled to offer as proof of her hostile work environment claim evidence "showing that harassment *existed* in the place of employment." *Id.* at 611, 262 Cal. Rptr. at 853 (emphasis added).

Defendants misread *Fisher* for two reasons. First, as just noted, personally witnessing the conduct towards others is required where, as here, Hardin was herself subjected to offensive remarks and touchings by Campbell. Only where a plaintiff "is *not* personally subjected to such remarks or touchings, must (she) establish that she personally witnessed the harassing conduct." *Id.* (emphasis added). Therefore, *Fisher* does not support defendants' contention that the jury instruction was erroneous; to the contrary, *Fisher* supports the way in which the jury was instructed.

Second, the crux of the *Fisher* decision is simply that "a plaintiff should be required to plead sufficient facts to establish a nexus between the alleged sexual harassment of others, her observation of that conduct and the work context in which it occurred." *Id.* at 613, 262 Cal. Rptr. at 854-55. The jury instructions in this case were in accord with *Fisher*. The Court instructed the jury that Campbell's conduct towards others was only relevant insofar as that conduct created a hostile or abusive working environment *for Hardin*. In particular, the jury was instructed that Hardin had to "show a connection between the sexual harassment of other employees and the existence of a hostile or abusive work environment for *her*." (Jury Instructions at 30 (emphasis added).)

Jury instructions are properly viewed as a whole to determine whether they adequately inform the jury. *Underhill v. Royal*, 769 F.2d 1426, 1433 (9th Cir. 1985). In addition to the instructions already mentioned, the jury was instructed to find a hostile work environment only if they found that (1) Campbell's conduct "was sufficiently severe or pervasive to alter the conditions of [Hardin's] employment," (2) Hardin "actually perceived her work environment to be hostile or abusive," (3) a "reasonable woman" would

perceive the work environment to be hostile, and (4) Campbell's "conduct . . . involve(d] more than isolated or trivial acts." (Jury Instructions at 26-28.) These instructions, not complained of by defendants, accurately state the law, and the jury is presumed to have followed them. Taken as a whole, the hostile work environment instructions set a sufficiently high threshold to preclude a finding of hostile work environment based on trivial conduct or Hardin's "mere awareness" of others being harassed by Campbell.

Even assuming the Court erred by instructing the jury on this point, the Court finds that the error was harmless because it more probably than not had no effect on the outcome. *Caballero*, 956 F.2d at 207. The clear weight of the evidence supports Hardin's allegation that Campbell *did* sexually harass her personally.

2.

Defendants next argue that the Court's definition of "adverse employment action" was overly broad and vague. The Court instructed the jury as follows:

> Adverse employment action can, but does not have to, result in an economic or tangible loss such as termination or denial of a salary increase. Adverse employment action can also be action that results in an intangible loss, such as unwarranted performance evaluations, or action that results in an unfavorable change in the normal benefits, rights, or conditions of plaintiff's employment.

(Jury Instructions at 41.) According to defendants, retaliation requires a finding of tangible loss of salary, benefits, job title, or duties.

As Hardin argues, however, defendants' definition of adverse employment action is too narrow. Cases interpreting Title VII have found that a broad range of actions can constitute adverse employment action. "Title VII does not limit

adverse job action to strictly monetary considerations. one does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture." *Collins v. Illinois*, 830 F.2d 692, 703 (7th Cir. 1987). For example, "an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationary [sic] and support services" all constitute adverse employment actions. *Id.* (footnotes omitted). In sum, "an objectively demeaning change of working conditions . . . can amount to" an adverse employment action.[2] *Darnell v. Campbell County Fiscal Ct.*; 731 F. Supp. 1309, 1313 (E.D. Ky. 1990), *aff'd*, 924 F.2d 1057 (6th Cir. 1991); *see generally* 2 Lex K. Larson, *Employment Discrimination* §34.04, at 34-52 to 34-66 (2d ed. 1995).

Campbell attempts to distinguish such cases on the grounds that a FEHA retaliation claim is narrower than one under Title VII. There is no authority for that proposition. As Hardin argues, the FEHA is interpreted by California courts in light of Title VII case law. *Flait v. North Am. Watch Corp.*, 3 Cal. App. 4th 467, 475-76, 4 Cal. Rptr. 2d 522, 528 (1992). Indeed, the Ninth Circuit has interpreted the FEHA as broadly as Title VII on the issue of what constitutes an adverse employment action. *See Strother v. Southern Cal. Permanente Medical Group*, 79 F.3d 859, 868-69 (9th Cir. 1996).

In *Strother*, the Ninth Circuit concluded that, while "mere ostracism in the workplace is not enough to show an adverse employment decision," the plaintiff, a doctor, had nevertheless stated a prima facie case for retaliation under the FEHA by showing that she was excluded from educa-

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[2]Retaliation can even take the form of sexual harassment — i.e., the accused harasser continues to engage in or increases the harassment. *See, e.g., Fisher*, 214 Cal. App. 3d at 615, 262 Cal. Rptr. At 856.

tional seminars and meetings, that she suffered verbal and physical abuse, that she was denied secretarial support, and that she was given a more burdensome work schedule. *Id.* at 869 (citation omitted).

The Court is satisfied that its instruction accurately reflects the law in the Ninth Circuit for a retaliation claim under the FEHA and Title VII.

3.

Defendants next argue that the Court erred by refusing to instruct the jury that Hardin could not recover damages for emotional distress caused by the stress of litigation. This argument was made and rejected by the Court at trial. Defendants have cited no authority for this argument. The two California cases cited by Campbell, *Pleasant v. Celli*, 18 Cal. App. 4th 841, 22 Cal. Rptr. 2d 663 (1993), and *Merenda v. Superior Ct.*, 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87 (1992), both hold that emotional distress damages are unavailable in legal malpractice actions. They make no mention of instructing the jury on the issue of emotional distress damages and are wholly inapposite.

The case cited by the City is likewise inapplicable. In *School Dist. No. 1 v. Nielsen*, 534 P.2d 1135 (Or. 1975), the court reversed damages for "humiliation" awarded to the plaintiff during an administrative agency hearing, where there was no evidence whatsoever that the plaintiff had suffered any humiliation. In so doing, the court noted that the plaintiff could not collect damages for her complaints about the pressures of litigation, which were not compensable. The case does not in any way involve the issue of jury instructions.

Campbell contends that the requested instruction was necessary because it was nowhere explained to the jury that litigation-related stress was not compensable. That is not entirely accurate. The Court specifically instructed the jury that it must find that defendants' wrongful conduct had proximately caused Hardin's damages in order to award

those damages. Obviously, litigation is not part of defendants' wrongful conduct.

The absence of case law on this issue confirms the Court's view that defendants' argument is not well taken. Obviously, there are thousands of cases on the books in which a plaintiff who sought and was awarded emotional distress damages was required to go through litigation. Yet the Court could discover no case in which a court instructed the jury that emotional distress caused by the litigation process itself was not recoverable.

4.

The City argues that the jury instruction on wrongful constructive termination was erroneous because it failed to include the required elements of intent and "aggravating conditions." These arguments, made and rejected at trial, are specious. The jury instruction included the following element: "Defendant City of Concord either intentionally created or knowingly permitted working conditions to remain intolerable, and could have remedied the situation but did not do so." (Jury Instructions at 50.) According to the City, this instruction was fatally flawed because the court omitted the phrase "in order to force the employee to resign" at the end of the sentence. For this proposition, the City relies on *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223 (1994). This argument misstates the holding of *Turner*.

The *Turner* court explicitly *rejected* an express intent requirement, reasoning as follows:

> An employer's intent to cause a resignation will rarely be revealed by direct evidence. Self interest will most often prevent an employer from announcing a constructive discharge strategy from the rooftops. *An express intent requirement might unduly focus the trier of fact's attention on the presence or absence of direct evidence.* But we see no reason why a standard requiring the

> employer's actual (rather than mere constructive) knowledge of the intolerable conditions would do so.

Id. at 1249, 32 Cal. Rptr. at 229 (emphasis added). As the *Turner* court explained, direct evidence of intent, is not necessary; it can be inferred from the fact that the employer *actually knew* about the intolerable conditions and refused to remedy them. *Id.* at 1249-50, 32 Cal. Rptr. at 1028. Ultimately, the court established the elements as follows:

> In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or *knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person* in the employee's position would be compelled to resign.

Id. at 1251, 32 Cal. Rptr. at 230. This is precisely what the jury instruction reflected. The instruction also tracks the BAJI instruction, which cites the *Turner* case as its basis.

The City also contends that the Court failed to require Hardin to prove "aggravating conditions" over and above a violation of public policy. This is untrue. The jury instruction specifically included as an element the following: "The working conditions were so intolerable or aggravated at the time of [Hardin's] resignation that a reasonable person in [Hardin's] position would have felt compelled to resign[.]" (Jury Instructions at 37, ¶4.)

5.

The City next argues that the jury instructions on the nature of Campbell's agency and whether or not he was a supervisor were erroneous. The content of these instructions was debated extensively by the parties during trial. Ulti-

mately, the Court determined that the jury should decide whether or not Campbell was Hardin's "supervisor" and whether or not he was an "agent" based on standard pattern instructions on those issues.

The City cites no authority for its proposed instructions. The City's complaints about the Court's pattern instructions appear to be based on the preposterous premise that Campbell was not an agent, supervisor, or employee of the City. It is simply not possible, however, that Campbell did not fall into one of those categories—otherwise, what was he? A mere bystander? The City has consistently tried to disavow any relationship whatsoever between Campbell and itself, when in fact Campbell was the Mayor of Concord, the highest-ranking officer of the City and, thus, the person most closely associated with the City *qua* municipality.

Even assuming, arguendo, that the jury instructions were incorrect, the error was harmless because those instructions could not have affected the outcome. *Caballero*, 956 F.2d at 207. In its special verdict, the jury determined that the City knew or should have known about Campbell's conduct but failed to remedy it. Regardless, therefore, of whether Campbell was an agent, supervisor, or merely a co-worker of Hardin, this finding alone is sufficient to hold the City liable for Campbell's actions under both the FEHA and Title VII.

The City likewise contends that, as a matter of law, Campbell was not an agent of the City acting within the scope of his authority when he engaged in sexually harassing conduct or retaliation. For this proposition, the City cites *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478 (1995).

In *Farmers*, the California Supreme Court held that, under the state Tort Claims Act, the County of Santa Clara was not required to indemnify one of its deputy sheriffs and pay his defense costs in a sexual harassment lawsuit brought by several female deputy sheriffs. In so holding, the court relied on cases in which courts had refused to hold an

employer vicariously liable for an employee's actions "where the misconduct does not arise from the conduct of the employer's enterprise" but instead from purely personal motives, *viz.*, where "the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." *Id.* at 1005-06, 47 Cal. Rptr. 2d at 487-88. The court concluded that the deputy sheriff's sexual harassing activity was "[n]either typical of [n]or broadly incidental to the operation of a county jail or to the duties and tasks of deputy sheriffs at such a jail." *Id.* at 1011, 47 Cal. Rptr. 2d at 491. Therefore, the County was not required to indemnify the deputy sheriff under state law.

As Hardin points out, however, *Farmers* was limited to the issue of whether indemnification for sexual harassment was required under California's Tort Claims Act. The *Farmers* court explicitly recognized that the County nonetheless could be held "*directly* liable to sexually harassed employees for compensatory damages in civil actions under FEHA." *Id.* at 1014, 47 Cal. Rptr. 2d at 493 (emphasis added). Such direct liability exists *independent* of the derivative liability also provided for by the FEHA. *Id.* at 1014 and n.12, 47 Cal. Rptr. 2d at 493 and n.12; *see also Caldwell v. Montoya*, 10 Cal. 4th 972, 989 n.9, 42 Cal. Rptr. 2d 842, 853 n.9 (1995). Under the FEHA, an employer is strictly liable for sexual harassment of employees by its agents and supervisors. *Kelly-Zurian v. Wohl-Shoe Co.*, 22 Cal. App. 4th 397, 415, 27 Cal. Rptr. 2d 457, 466 (1994) (Citing *Fisher*, 214 Cal. App. 3d at 608 n.6, 262 Cal. Rptr. at 851 n.6).

Moreover, as noted above, even if Campbell was not an agent or supervisor for purposes of the FEHA, the jury's verdict would remain intact. The City would still be liable based on Campbell's conduct because the jury found that the City knew or should have known about Campbell's conduct and failed to take prompt, effective action to remedy it. This

finding gave rise to liability under both the FEHA and Title VII.

B.

Campbell also contends that the Court erred by excluding Rhoma Young's testimony.

At the first trial, the Court excluded the Kay & Stevens report and the testimony of investigator Carol Stevens pertaining to the contents of the report, under Rule 403 of the Federal Rules of Evidence. The Court reasoned as follows:

> First, evidence of the report would be unduly prejudicial, because it would effectively take key determinations away from the jury. Second, much of the evidence in the report was cumulative. Many Concord workers who gave witness statements in the course of the investigation also testified at trial. The jury could assess the credibility of the witnesses as well as Carol Stevens could. Just because Carol Stevens is an attorney does not mean she was better qualified to judge credibility than the jury. Finally, introduction of the report would have dramatically lengthened the trial, because Campbell would have been required to attack the findings contained therein.

(Mem. Decision & Order filed May 3, 1995 (rejecting Hardin's argument that the Court erroneously excluded the evidence at trial).)

In doing so, the Court also excluded Young's expert testimony, which pertained only to the validity of the Kay & Stevens report's methodology and conclusions. The court *did* allow Hardin to introduce the City Council's Resolution 92-16, however, for purposes of showing that the city had notice of Campbell's conduct.

Before the second trial, the Court ruled that Stevens would be allowed to testify that Hardin reported problems with Campbell to her, because those statements were offered not for their truth but to show that Hardin had reported the

incidents. The Court, however, reiterated its ruling at the first trial that Stevens could not testify "regarding her findings of retaliation and the weakening of the language of Resolution 92-16 under Federal Rule of Evidence 403 because the probative value of this evidence is substantially outweighed by the danger of misleading or confusing the jury as to their fact finding role." (Order re Mots. In Limine for Second Trial filed Jan. 18, 1996.)

Campbell claims that once Stevens was allowed to testify at the second trial, thereby introducing additional evidence about the investigation, Campbell was prejudiced because the Court did not allow him to challenge the conclusions and methodology of the Kay & Stevens report through Young's testimony.

As Hardin argues, however, Stevens' testimony was admitted only to show that the City had notice of Campbell's conduct. Stevens was permitted to testify to what Hardin told her about Campbell's conduct during the course of the Kay & Stevens investigation. None of the evidence was admitted against Campbell or admitted for its truth; rather, it was subject to explicit limiting instructions admitting it solely against the City in order to show that the City was on notice of the harassment.

The Court's decision to admit Stevens' testimony did not open the door to all testimony regarding the Kay & Stevens investigation and report, nor did it alter the limited purposes for which other evidence, such as the Resolution, had already been offered during the first trial. The methodology and conclusions of the Kay Stevens report were irrelevant to Stevens' testimony at trial; therefore, Young's testimony was properly excluded.

C.

The City argues that the Court erred by admitting evidence regarding the so-called hostile letter-writing campaign. The Court finds that the City waived this objection by failing to raise it prior to the second trial and so does not reach its

merits. Furthermore, Hardin, the City and Campbell entered into a Stipulation that they requested the Court read to the jury. The parties agreed that the Stipulation would provide the factual basis from which the jury could infer whether Campbell organized the letter-writing campaign and what effect, if any, it had on Hardin and the notice of Campbell's actions to the City.

D.

Finally, the City moves for a new trial on all three claims on the ground that the jury verdicts were against the weight of the evidence. In the alternative, the City asks the Court to reduce the damages awarded as excessive.

A district court may grant "a motion for a new trial pursuant to [Rule] 59 if the verdict is against the clear weight of the evidence." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). This standard gives the district court more discretion than it possesses in deciding a motion for judgment as a matter of law. "The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Id.* (citations omitted). The Ninth Circuit has cautioned that this discretion should not be construed so broadly as to cause courts to usurp the role of the jury:

> [A] decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Id. at 1371-72 (quoting C. Wright & A. Miller, *Federal Practice and Procedure* §2806 at 48-49 (1973)).

The Court has, of course, already granted a new trial in this case because the first jury found in favor of defendants against the clear weight of the evidence. Thus, the Court is somewhat taken aback by the City's argument that the verdicts in the second trial were against the clear weight of the evidence after the jury returned a verdict for *Hardin*.

The Court finds that the jury's verdicts against defendants on Hardin's claims of sexual harassment, retaliation, and wrongful constructive termination[3] were not against the clear weight of the evidence, nor were the damages awarded excessive.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motions for a new trial are DENIED.

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[3]The Court's determination that the City is not entitled to a new trial on the wrongful constructive termination claim makes it unnecessary to reach the City's motion for judgment as a matter of law on that claim, as such a motion is subject to a more stringent standard. *See* Fed. R. Civ. P. 50.

2. The City's motion for judgment as a matter of law on the claim of wrongful constructive termination is DENIED.

Dated: July 30, 1995.

/s/
William H. Orrick
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT, NOVEMBER 10, 1994

THE COURT: GOOD MORNING, COUNSEL. PLEASE BE SEATED. FIRST, I'M GOING TO DEAL WITH THE RULE 50 MOTIONS. I HAVE READ CAMPBELL'S RULE 50 MOTION AND I DENY IT. I THINK THERE IS ENOUGH IN THERE FOR THE JURY TO MAKE UP ITS MIND. IT'S A QUESTION OF FACT AND THE APPLICATION OF THE INSTRUCTIONS.

NEXT, WITH RESPECT TO THE RULE 50 MOTIONS FILED BY THE CITY ON THE QUESTION OF WHETHER OR NOT THERE'S INTENTIONAL DISCRIMINATION BY CONCORD, I DENY THAT MOTION. THE JURY IS GOING TO WEIGH THE EVIDENCE AND MAKE ITS DETERMINATIONS WITH REGARD TO THE CREDIBILITY OF THE WITNESSES.

* * * *

NEXT, THE SAME OLD ARGUMENT ABOUT WHETHER OR NOT THE PLAINTIFF IS COVERED BY TITLE VII. THAT IS A MOTION FOR RECONSIDERATION, ABOUT THE FOURTH. AND, LIKE THE OTHERS, IT'S DENIED OUT OF HAND.

DECISION OF THE UNITED STATES DISTRICT COURT, OCTOBER 6, 1994

(JURY NOT PRESENT)

THE COURT: MORNING, COUNSEL.

MS. SHOSTAK: MORNING, YOUR HONOR.

THE COURT: WE HAVE A BART PROBLEM THIS MORNING, SO WE'RE SHY TWO JURORS, BUT I'M SURE WE CAN MAKE GOOD USE OF THIS TIME.

FIRST, WITH RESPECT TO WHAT WE CALLED THE PACKAGE YESTERDAY, AND THE NEWSPAPER CLIPPINGS, I AM NOT GOING TO ADMIT THOSE NEWSPAPER CLIPPINGS; THEY INCLUDE SOME FACTS—WHAT PURPORT TO BE FACTS, WHICH ARE NOT FACTS IN THIS CASE. FOR EXAMPLE, RACE ISN'T IT A FACTOR IN THE CASE. AND THESE ARE JUST THE KIND OF NEWSPAPER CLIPPINGS THAT WE WARNED THE JURORS NOT TO LOOK AT. SO THEY ARE NOT—WILL NOT BE ADMITTED.

SECONDLY, WITH RESPECT TO THE LETTERS, THE LETTERS, AS EVERYBODY KNOWS, CONTAIN NOTHING BUT SCURRILOUS COMMENTS WITH RESPECT TO THE PLAINTIFF AND HER—HOW SHE CARRIES OUT HER DUTIES, BUT I'M NOT GOING TO ADMIT THE LETTERS; IF I DO, I THINK I'M ASKING FOR 60 MORE WITNESSES, IF THAT'S IT, AND I DON'T THINK THAT, STANDING BY THEMSELVES, THEY'RE RELEVANT, NOR DO I THINK THAT THEY COULD RISE TO THE DIGNITY OF AN APPROPRIATE INFERENCE TO HAVE BEEN DRAWN FROM THE FACT THAT THERE WERE TWO OR THREE BEFORE THE MEETING, AND A NUMBER AFTERWARDS.

I WILL, HOWEVER, IF THE PLAINTIFF WANTS TO GO AHEAD, I WILL SELECT AT RANDOM THREE LETTERS, AND I WILL ASK COUNSEL TO STIPULATE WITH RESPECT TO THE NUMBER OF OTHER LETTERS. AND IF THEY DON'T STIPULATE, I'LL SIT

DOWN WITH THEM, AND WE'LL ALL TOGETHER SIT DOWN AND COUNT THE OTHER LETTERS.

NOW, I DON'T KNOW IF THAT'S SATISFACTORY OR NOT.

DO YOU STILL WANT TO OFFER THE LETTERS?

MS. SHOSTAK: I WOULD LIKE—I STILL WOULD LIKE TO OFFER—WHAT I WOULD LIKE TO HAVE IN EVIDENCE, YOUR HONOR, IS THE—THE COMPARATIVE NUMBER. AND I CAN UNDERSTAND YOUR HONOR'S NOTION OF A RANDOM SELECTED SAMPLING, AND I THINK THAT THAT—I CAN UNDERSTAND YOUR HONOR'S RATIONALE THAT THAT BALANCES THE INTERESTS OF THE—THE TWO PARTIES, AS LONG AS THAT DOESN'T MEAN THAT WE'RE BARRED FROM ARGUING THAT THERE WAS THIS PHENOMENON OF THIS CRITICISM IN THE SPRING, AND IT WAS BROUGHT TO THE COUNCIL'S ATTENTION.

AS I UNDERSTAND FROM YOUR HONOR'S RULING, YOU ARE PERMITTING US TO WALK A MIDDLE LINE IN—IN THAT REGARD?

THE COURT: YES.

MS. SHOSTAK: OKAY. THAT—THAT IS—THAT IS ACCEPTABLE, YOUR HONOR.

THE COURT: ALL RIGHT. SO, THEN, YOU AND MR. GLAESSNER, I GUESS, ARE THE TWO MAIN PARTIES INVOLVED, YOU CAN SIT DOWN AND TELL ME THE EXACT NUMBER, AND WHEN YOU'VE DONE THAT, I'LL TAKE THESE AND PULL OUT THREE.

YES, MR. GLAESSNER.

MR. GLAESSNER: COULD I—COULD I JUST ASK FOR A BIT OF CLARIFICATION?

THE COURT: YES.

MR. GLAESSNER: I UNDERSTAND YOUR HONOR'S RULING, AND I THINK THAT'S CERTAINLY A MIDDLE GROUND, AS MS. SHOSTAK

SAYS. OBVIOUSLY, THE JURY'S ALREADY HEARD ABOUT THE NUMERICAL DIFFERENCE BETWEEN THE LETTERS BEFORE AND AFTERWARDS, AND I WOULD EXPECT THAT WE WOULD WANT TO CERTAINLY ASK MR. CAMPBELL TO COMMENT UPON THAT, IN TERMS OF ANY PURPORTED INVOLVEMENT ON HIS PART. BUT AS TO ANY LETTERS THAT—THAT DO COME INTO EVIDENCE, I WOULD ASK THAT THE COURT BE WILLING TO PERMIT US, NOT, OBVIOUSLY, TO CALL EACH AND EVERY LETTER WRITER, BECAUSE THE LETTERS AREN'T COMING IN, BUT TO CALL AT LEAST THOSE PERSONS THAT RELATE TO THE LETTERS THAT ARE COMING INTO EVIDENCE, OR ONE OR TWO PEOPLE, JUST GENERALLY TO EXPLAIN THAT THEY WROTE LETTERS BECAUSE THEY BELIEVED IN WHAT THEY SAID, THEY DIDN'T DO IT AT MR. CAMPBELL'S REQUEST. IN OTHER WORDS, I DON'T WANT TO CALL 60 PEOPLE; I'D LIKE TO BE ABLE TO CALL ONE OR TWO OR THREE PEOPLE MAYBE, IF NECESSARY.

THE COURT: WELL, YOU CAN CALL THE PURPORTED WRITERS OF THE LETTERS WHICH I SELECT BY RANDOM. AND THOSE WITNESSES CAN BE DEPOSED BEFORE THEY APPEAR, IF THEY, INDEED, ARE GOING TO APPEAR.

MS. SHOSTAK: YOUR HONOR, MAY I ASK A POINT OF CLARIFICATION? UNDER YOUR HONOR'S RULING, WOULD IT BE PERMISSIBLE FOR PLAINTIFF TO CROSS-EXAMINE MR. CAMPBELL ON HIS AWARENESS OF THE BREADTH OF THE LETTERS

THE COURT: OH, YES, THAT'LL BE —

MS. SHOSTAK: —AND WHETHER HE HAD A RELATIONSHIP TO THE PEOPLE WHO WROTE THOSE LETTERS? AND I MEAN MORE THAN JUST—

I MEAN MORE THAN JUST THE THREE RANDOM. AND —

THE COURT: WELL, YOU CAN EXAMINE HIM WITH RESPECT TO HIS KNOWLEDGE OF THE LETTERS, BUT AS SOON AS YOU GET INTO INDIVIDUALS, THEN HE'S ENTITLED TO BE ABLE TO CALL THOSE INDIVIDUALS, AND AS I'VE JUST GOTTEN THROUGH, WE'RE GOING TO HAVE THREE, AT THE MOST, AND THEY'RE GOING TO BE THREE THAT ARE INDIVIDUALS THAT WERE SIGNATORY TO THE LETTERS THAT I SELECT AT RANDOM. AND I'LL LET YOU AND MR. GLAESSNER AGREE ON THE STIPULATION. I'LL SIT HERE AND HOLD UP THE LETTERS, AND PULL OUT ONE, TWO OR THREE.

MS. SHOSTAK: YOUR HONOR, I'M NOT—I'M NOT ARGUING WITH YOUR HONOR, I'M TRYING TO MAKE SURE I UNDERSTAND —

THE COURT: YEAH.

MS. SHOSTAK:—SO I GET IT RIGHT. WILL I BE PERMITTED, IN ADDITION TO THE THREE RANDOM LETTERS —

THE COURT: YES.

MS. SHOSTAK: —TO ASK HIM IF HE WAS GENERALLY AWARE OF THE LETTERS THAT WERE APPEARING, AND IF HE KNEW OR HAD A—A BUSINESS, POLITICAL OR FRIENDSHIP RELATIONSHIP WITH LETTER WRITERS OTHER THAN THE THREE THAT ARE ARE GOING TO BE RANDOMLY SELECTED?

THE COURT: YES. I THINK THAT'S PROPER CROSS-EXAMINATION, AND THE STIPULATION WILL BE IN EVIDENCE.

MS. SHOSTAK: THANK YOU, YOUR HONOR.

MR. GLAESSNER: YOUR HONOR, I'M SORRY TO KEEP GOING ON THIS, BUT IT'S A COMPLICATED POINT, IN TERMS OF HOW THIS PROCEEDS. AND I

GUESS I'M REALLY ASKING THE COROLLARY OF WHAT MS. SHOSTAK IS ASKING YOU.

AM I PERMITTED ON MY CROSS-EXAMINATION OF MRS. HARDIN, THEN, TO GO INTO HER—HER BELIEFS AND HER UNDERSTANDING OF WHO WROTE A LETTER THAT WAS NOT ACTUALLY WRITTEN BY THEM? WHOSE NAME APPEARS IN A LETTER THAT WAS NOT ACTUALLY WRITTEN BY THEM? BECAUSE THAT'S SOMETHING THAT WAS GONE INTO IN HER DEPOSITION, AND I WANT TO HAVE THE OPPORTUNITY, ASSUMING THAT THAT'S WHAT THE COURT IS PERMITTING, TO GO INTO THAT ON HER CROSS-EXAMINATION.

THE COURT: WELL, I'LL—I WON'T DECIDE THAT IN ADVANCE, BECAUSE I HAVEN'T GOT YOUR QUESTIONS IN MIND.

MR. GLAESSNER: THANK YOU.

THE COURT: WE'LL DEAL WITH THAT WHEN THAT COMES UP.

MR. GLAESSNER: THANK YOU, YOUR HONOR.

DECISION OF THE UNITED STATES DISTRICT COURT, SEPTEMBER 22, 1994

THE COURT: NOW, CAMPBELL'S MOTIONS IN LIMINE.

* * * *

THE MOTION TO PRECLUDE THE USE OF THE TERM "FAKE LETTERS," DENIED. THAT'S DENIED BECAUSE THE ATTORNEYS WAIVED THE OBJECTION AT THE DEPOSITIONS, AND THE EVIDENCE ISN'T SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE. THE PLAINTIFF, OF COURSE, IS GOING TO HAVE TO PROVE BY ADMISSIBLE EVIDENCE THAT THE LETTERS WERE ACTUALLY FABRICATED, AND I TAKE IT THAT'S QUITE A JOB.

TWELVE, THE MOTION TO PRECLUDE THE USE OF THE TERMS "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN," DENIED FOR THE SAME REASONS IN THE PRIOR MOTION.

DECISION OF THE UNITED STATES DISTRICT COURT, FILED SEPTEMBER 20, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, vs. CITY OF CONCORD; BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember,	No. C-93-1297 WHO MEMORANDUM DECISION AND ORDER

In this action brought by Rita Ellen Hardin ("Hardin"), formerly the City Manager of the City of Concord, against the City of Concord ("City") and its former Mayor Byron Campbell ("Campbell") charging *inter alia* sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000, *et seq.*, the City and Campbell filed motions for summary judgment and judgment on the pleadings. The Court, having considered the pleadings and having had the benefit of oral argument, DENIES the City's motion for summary judgment as to Hardin's Title VII claim against the City, GRANTS (1) the City's motion for summary judgment as to Hardin's claim against the City for punitive damages, (2) Campbell's motion for judgment on the pleadings as to Hardin's Title VII claim for monetary damages based upon her sixth and seventh causes of action which charge intentional and/or negligent misrepresentation, respectively, and (3) her eighth cause of action charging interference with her contractual relations with the City. The Court further

DENIES the City's and Campbell's motions to dismiss Hardin's pendent state claims.

I.

Hardin was appointed to the position of City Manager for the City in June 1990. In October 1992, her employment was terminated. She claims that the termination resulted from a course of discriminatory and retaliatory conduct by the City and Campbell. Campbell served as both Mayor and a member of the City Council during Hardin's tenure. Additionally, in his role as mayor, Campbell was Hardin's direct supervisor.

Hardin alleges that the discrimination and retaliation to which she was subjected was prompted by her decision to investigate claims of other City employees concerning sexual harassment by Campbell. She further alleges that the City failed to respond appropriately to her allegations against Campbell. On April 12, 1993, Hardin filed her complaint with the Court alleging nine causes of action against the City a[illegible] Campbell.[1]

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[1]Hardin's nine causes of action are for: (1) violation of civil rights; sexual harassment; sexual discrimination; retaliation (against both defendants); (2) breach of written contract (against the City); (3) breach of implied covenant of good faith and fair dealing (against the City); (4) wrongful and constructive discharge (against the City); (5) defamation (against Campbell); (6) intentional misrepresentation (against both defendants); (7) negligent misrepresentation (against both defendants); (8) intentional interference with contractual relations (against Campbell); and (9) assault and battery (against Campbell).

In her opposition papers, Hardin "suggests" that she be allowed leave to amend her complaint under Rule 15(c) of the Federal Rules of Civil Procedure to add three new claims. These include a claim against the City under 42 U.S.C. § 1983; a claim against Campbell under Title VII 42 U.S.C. § 2000e for injunctive relief; and "collateral" claims under her sixth and seventh causes of action against Campbell for negligent or intentional misrepresentation. Each claim raises a different set of factual issues and is subject to a different set of defenses. The need for a new response, further discovery and dispositive motions would inevitably delay the trial date further. For these reasons, and those stated at the hearing, the Court refuses to recognize Hardin's "suggestion" that

(continued . . .)

Campbell denies that he harassed Hardin. He maintains that his alleged conflicts with her were based on disputes that they had concerning their respective roles and decision-making powers. Campbell has also asserted a claim for indemnification against the City. In its defense, the City maintains that, contrary to Hardin's allegations, it took appropriate remedial steps to eliminate the hostile work environment of which she complained. Further, against Campbell, the City asserts that, if Campbell is liable, the City cannot be held liable because Campbell's acts were outside of the scope of his employment.

II.

The Court deals *seriatim* with each motion.

A. The City's Motion for Summary Judgment on Hardin's Title VII Claim Against It.

1.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court's 1986 "trilogy" of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), requires that a party seeking summary judgment identify evidence that shows the absence of a genuine issue of material fact. Once the moving party has made this showing, the nonmoving

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(. . . continued)
she be granted leave to amend her complaint.

party must "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56 (e)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted).

2.

The gravamen of the City's summary judgment motion with respect to Hardin's Title VII claim is that in her former capacity as City Manager, she was an appointee on the policymaking level, and is, therefore, exempt from Title VII's protective mandates. The pertinent exemption to Title VII provides in part:

> the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, *or an appointee on the policy making level* or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e(f) (West Supp. 1994) (emphasis added).

To determine whether Hardin is barred from pursuing a Title VII cause of action against the City because she falls within the § 2000e(f) exemption, the Court must address two issues. First, the Court must decide whether Hardin was "an appointee on the policymaking level." Second, the Court must consider whether Hardin was exempt from the City's

civil service laws. Before the Court can determine that Hardin is exempt from Title VII under the terms of § 2000e(f), both conditions must be met. § 2000e(f).

First, the Court must determine the facts and circumstances of the employment relationship between the complaining official and the elected officials and, second, examine the evidence presented as to the complaining official's level of authority and scope of duties. § 2000e(f).

(a).

Hardin meets the first requirement for exemption under Title VII because she, as City Manager, was a "policymaker" for the purposes of Title VII. § 2000e(f). Her argument that the City Council had the ultimate authority to adopt or reject her policy recommendations is not dispositive. The language of the exemption is carefully worded to apply to either a person, "elected to public office . . . *or* an appointee on the policy making level." § 2000e(f) (emphasis added).

Hardin had significant responsibilities as City Manager, including formulating specific policies and implementing general policy directives of the City Council as well as drafting policy proposals and advising the City Council. Among other things, she was engaged in preparing a 1991 strategic plan for the City (Decl. of Steve Jepsen, filed July 6, 1994, Ex. A); providing the City Council with cutback solutions during Council meetings in June 1991, July 1991, August 1991, September 1991, January 1992, and February 1992; developing a Budget Reduction Committee to formulate cooperative solutions using labor and management working together; developing a down-sized organization and a plan to bring the City's budget into balance; creating an Early Retirement Program; mitigating layoffs via transfers and placements; and achieving the City's Affirmative Action goals. (Decl. of Richard Whitmore, filed July 6, 1994, Ex. E.) The fact that the City Council was ultimately responsible for the policies of the City does not mean that Hardin was not a policymaker under § 2000e(f).

"[P]olicymaking is not a zero-sum game. The exercise by the [City Council] of extensive policymaking power does not preclude, and is in fact complementary to, the concurrent exercise of wideranging policymaking authority by the [City Manager] as the highest appointed official of the [City]." *EEOC v. Board of Trustees of Wayne County Community College*, 723 F.2d 509, 511 (6th Cir. 1983) (community college president is policymaker even though Michigan law provides that policies of community colleges are to be determined solely by the Board of Trustees).

Many courts, in interpreting § 2000e(f) and its counterpart provision under the Age Discrimination in Employment Act ("ADEA"),[2] have found that appointed individuals with fewer responsibilities than Concord's City Manager are policymakers. *See, e.g., Ramirez v. San Mateo County District Attorney's Office*, 639 F.2d 509 (9th Cir. 1981); (deputy district attorney); Gregory v. Ashcroft, 501 U.S.. 452 (1991) (state judge); *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981) (undersheriff); *Heck v. City of Freeport*, 985 F.2d 305, 310 (7th. Cir. 1993) (city's general inspector); *Board of Trustees of Wayne County Community College*, 723 F.2d at 509 (community college president).

In addition, the Equal Employment Opportunity Commission ("EEOC") determined that a city commissioner of the Department of Administrative Services (who was effectively a department head) was a "policymaker" for the purposes of Title VII. Decision No. 79-8, 1978 WL 5829 (EEOC). The EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need only be reasonable to be entitled to deference. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988). If a department

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[2]The identical exemption for policy makers under the ADEA is set forth at 29 U.S.C. § 630(f) (1985). Title VII's and the ADEA's identical and complementary provisions exempting local and state officials are to be construed consistently. *Monce v. City of San Diego*, 895 F-2d 560, 561 (9th Cir. 1990).

head falls under the exemption, then the office of City Manager should fall under the exemption as well because, as City Manager, Hardin supervised department heads.

Because Hardin exercised significant policymaking functions as City Manager, the Court finds that she was "an appointee on the policymaking level" under Title VII. Next, the Court must determine whether Hardin was subject to the civil service laws of the City.

(b).

The City maintains that its civil service laws did not apply to Hardin because, as City Manager, she was a member of the City's "Exempt Service." A review of all of the interlocking provisions of the City's civil service laws reveals, however, that the City is incorrect. Hardin's status simply removed her from the coverage of some of the civil service laws, but left her protected by others.

Confusion concerning whether the City Manager is or is not subject to the City's civil service ordinances arises from the language of Concord Municipal Code, Article XI, Chapter 3, section 11304B pertaining to "Employment with the City." Code section 11304B provides:

> The provisions of this chapter, Personnel Rules, Personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters shall apply to all offices, employments, and positions in the service of the city, *except those in the Exempt Service*. However, the provisions of this chapter, Personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters pertaining to hours of work, overtime, vacations, sick leave, and holidays *shall apply to all full-time exempt Positions, except for those in special positions*. Further, that those appointed to full time exempt positions may participate in promo-

> tional examinations as provided by the Personnel Rules . . . . *Also, the provisions of Section 11311* [pertaining to prohibitions on political activity] *shall apply to all but elective offices.*

(Decl. of Laura V. Best, filed July 21, 1994, Ex. K, Concord Municipal Code Article XI, Chapter 3, § 11304(B) (emphasis added).)[3]

The City argues that Hardin, as a member of the "Exempt Service" is not subject to Concord's civil service laws and, thus, falls under the Title VII exemption. All members of the "Exempt Service," however, are not treated identically. "Exempt Service" is one of two general categories of City employees, the other being the "Competitive Service." The general category of "Exempt Service" is further broken down into three subcategories:

1. Elective Offices:
    a. City Clerk;
    b. City Treasurer.
2. Appointive positions:
    a. *City Manager*, Chief of Police, and their secretaries;
    b. City Attorney, Assistant City Attorney, any Deputy City Attorney, and Executive Secretary-City Attorney;
    c. All heads of departments;
    d. Deputy City Treasurer;
    e. Project positions (positions created for projects funded entirely or in part by grants made to the City);
    f. Purchasing Agent.
3. special positions:
    a. Members of appointive boards, commissions, and committees;

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[3]All sections of Article XI, Chapter 3 of the Concord Municipal Code are hereinafter referred to as "Code §" and can be found in Exhibit K to the Best Declaration unless otherwise noted.

b. Persons engaged under contract to supply expert, professional, or technical services for a definite period of time;

c. Voluntary personnel who receive no regular compensation from the City.

Code § 11304A (emphasis added).

As City Manager, Hardin was a member of the "Exempt Service" in the "appointive positions" category. Therefore, under the plain language of § 11304(B), Hardin is subject to "the provisions of [Chapter 3] Personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters pertaining to hours of work, overtime, vacations, sick leave, and holidays" because these "apply to all full-time exempt positions, except for those in special positions." Code § 11304B.

Moreover, Hardin also falls under the City's definition of "employee." Code § 11301. This definition, like § 11304B, also distinguishes between employees in each of the "Exempt Service" subcategories. Code § 11304B. "Employee" is defined to include "*appointive officers* and those employed by the City of Concord, but does not include *elected officers* or those persons assigned to *special positions* in the Exempt Service-" § 11301. As a full-time employee under § 11301 Hardin is also afforded protection under the City's anti-discrimination laws. Code § 11302.

The City argues that if the Court finds that Hardin is subject to its civil service laws, then the "Exempt Service" provision is meaningless. As discussed above, however, the law is carefully crafted to include Hardin in portions of the civil service system. To remove an employee from the protections of Title VII it is necessary that the employee be both a policymaker and be exempt from the City's civil service laws. § 2000e(f). Because Hardin is not exempt from the civil service system, she may bring a Title VII claim against the City and, therefore, the Court DENIES the City's motion for summary judgment.

B. The City's Motion for Summary Judgment on Hardin's Claim for Punitive Damages.

Hardin seeks unspecified punitive damages from the City for violation of Title VII, the California Fair Employment and Housing Act, tortious breach of contract, and wrongful discharge. A plaintiff, however, is precluded from recovering punitive damages from the City due to its public entity status.

The Supreme Court has held that punitive damages may not be assessed against public entities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Accordingly, the Court GRANTS the City's motion for summary judgment.

C. Campbell's Motion for Judgment on the Pleadings on Hardin's First Cause of Action Against Campbell for Monetary Damages Under Title VII.

Campbell, as an individual, cannot be held individually liable for monetary damages under Title VII. This Court in *Sattar v. Unocal Corp.*, 829 F. Supp. 332 (N.D. Cal. 1993), and the subsequent Ninth Circuit case of *Miller v. Maxwell's International Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. LaRosa*, 224 S. Ct. 1049 (1994), established that managerial and/or supervisory employees cannot be held individually liable for alleged violations under Title VII. Accordingly, the Court GRANTS Campbell's motion for judgment on the pleadings.[4]

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[4]Hardin, in her opposition, expressly conceded that "[d]efendant Campbell cannot be held individually liable for monetary damages under Title VII." Plf.'s Mem. P. & A., filed July 21, 1994, at 8:24-25.

D. Campbell's Motion for Judgment on the Pleadings on Hardin's Sixth and Seventh Causes of Action Against Campbell for Intentional and/or Negligent Misrepresentation.

Campbell moves for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure on Hardin's sixth and seventh causes of action alleging intentional and/or negligent misrepresentation.[5] Based on the nature of Hardin's claims, Campbell argues that Hardin may only pursue a cause of action under a theory of breach of contract, not tortious misrepresentation. Under California law, a tort arising out of an employment relationship may only exist when the plaintiff's alleged damages do not result from the termination itself. *Hunter v. Up-Right Inc.*, 6 Cal. 4th 1174, 1178, 26 Cal. Rptr. 2d 8, 9 (1993) (citing *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988)). This is because the employer-employee relationship is fundamentally contractual. *Hunter*, 6 Cal. 4th at 1180, 26 Cal. Rptr. 2d at 10.

Hardin asserts that her misrepresentation claims are unrelated to her termination. Hardin's allegations of misrepresentation can generally be separated into two categories. First, Hardin asserts that Campbell knowingly or negligently made false representations of continued employment and that she was denied pay increases while employed. Both, if true, constitute unperformed contractual promises by the City.

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[5]The elements for a cause of action for negligent misrepresentation include a representation as to a material fact made by the defendant; that the representation was untrue; that the defendant made the representation without any reasonable ground for believing it to be true; the representation was made with the intent to induce the plaintiff to rely on it; the plaintiff was unaware of the falsity of the representation; actual and justified reliance by the plaintiff; and that the plaintiff sustained damages as a result of his reliance. *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 216 Cal. App. 3d 388, 402, 264 Cal. Rptr. 779, 784 (1989). The absence of any one of these required elements will preclude recovery as a matter of law. *Gonzalez v. Hodgson*, 38 Cal. 2d 91, 101 (1951).

Under *Foley*, these first claims are recoverable only under theories of breach of contract, not under theories of tortious conduct. *Foley*, 47 Cal. 3d 654, 254 Cal. Rptr. 211.

Hardin's second category of allegations amount to the assertion that Campbell "induced" her into an employment contract as City Manager by misrepresenting the terms and conditions of her employment. Specifically, Hardin alleges that she was induced into an employment relationship that caused her to suffer injuries in the form of being subjected to a hostile and discriminatory work environment.

Hardin argues that neither *Hunter* nor *Foley* explicitly prohibit actions based on alleged misrepresentations aimed at "inducing" an employment relationship. *Hunter*, 6 Cal. 4th at 1185, 26 Cal. Rptr. 2d at 14. Hardin relies on the following language in Hunter: "a misrepresentation *not* aimed at effecting termination of employment, but instead designed to induce the employee to alter detrimentally his or her position in some other respect, might form a basis for a valid fraud claim even in the context of a wrongful termination." 6 Cal. 4th at 1185, 26 Cal. Rptr. 2d at 14. Hardin, however, fails to cite subsequent language in *Hunter* that states that the detrimental reliance must be related to conditions "collateral to the employment contract itself." *Id.* (citing *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 509-510 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) (employees who entered settlement agreement with employer, giving up right to sue under Title VII, and were soon thereafter laid off may bring fraud cause of action against employer).

Hardin does not argue that she was "induced" to apply for the position of City Manager because of a negligent promise by Campbell of a significant change in the benefits or privileges afforded to the City Manager. In effect, Hardin argues that the contract she entered into as City Manager was breached when Campbell allegedly created a hostile and discriminatory work environment. These allegations, if true, only amount to a claim for breach of contract, because any detrimental reliance on her part was not collateral to the

employment contract itself. As such these allegations are no different from Hardin's first set of claims and thus she may not recover in tort. Therefore, the Court GRANTS Campbell's motion for judgment on the pleadings as to Hardin's sixth and seventh causes of action.

E. Campbell's Motion for Judgment on the Pleadings as to Hardin's Eighth Cause of Action for Interference With Hardin's Contractual Relations.

While California recognizes a cause of action against noncontracting parties or strangers to a contract who interfere with the performance of a contract, a contracting party owes no general duty to another not to interfere with performance of the contract. *Shoemaker v. Myers*, 52 Cal. 3d 1, 24-25, 276 Cal. Rptr. 303, 318 (1990). The tort duty not to interfere with the contract falls only on strangers or "interlopers" who have no legitimate interest in the scope or course of the contract's performance. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514, 28 Cal. Rptr. 2d 475, 480 (1994). Only a breach of contract claim may be stated against a breaching party. *Id.* at 516-17, 28 Cal. Rptr. 2d at 482.

Campbell was signatory to Hardin's employment contract as an agent of the City when the parties agreed on the contract. Campbell, as Mayor and a member of the City Council, was neither an outsider nor an interloper to the contract. He had an interest in the scope or course of the contract's performance. Further, even if Campbell acted in his individual capacity to interfere with Hardin's contract with the City, "[a] party may breach a contract . . . because of personal, racial, or ethnic animus, or for other nefarious or unethical reasons . . . . [M]otivation is irrelevant." *Id.* Because Campbell was a party to the contract, Hardin may not pursue her claim against him for interference with contractual relations, and the Court GRANTS Campbell's

motion for judgment on the pleadings as to the eighth cause of action.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. The City's motion for summary judgment as to Hardin's Title VII claims against the City is DENIED.

2. The City's motion for summary judgment as to Hardin's claim against the City for punitive damages is GRANTED.

3. Campbell's motion for judgment on the pleadings as to Hardin's Title VII claim for monetary damages is GRANTED.

4. Campbell's motion for judgment on the pleadings as to Hardin's sixth and seventh causes of action for intentional and/or negligent misrepresentation is GRANTED.

5. Campbell's motion for judgment on the pleadings as to Hardin's eighth cause of action for interference with Hardin's contractual relations with the City is GRANTED;

6. The City's and Campbell's motion to dismiss Hardin's pendent state claims is DENIED.

7. The following claims remain for trial:

a. *Hardin v. Campbell*:

(1) First cause of action for violation of Hardin's civil rights under California's Fair Employment and Housing Act ("FEHA").

(2) Fifth cause of action for defamation; and

(3) Ninth cause of action for assault and battery.

b. *Hardin v. City*:

(1) First cause of action for violation of Title VII and for violation of Hardin's civil rights under FEHA.

(2) Second cause of action for breach of contract.

(3) Third cause of action for breach of the implied covenant of good faith and fair dealing.

(4) Fourth cause of action for wrongful and constructive discharge.

(5) Sixth cause of action for intentional misrepresentation.

(6) Seventh cause of action for negligent misrepresentation.

c. *Campbell v. City*:

Campbell and the City cross-claim against each other for indemnification. The trial on the cross-claims is a bench trial and is bifurcated.

Dated: September 19, 1994.

/s/
William H. Orrick
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT, FILED AUGUST 31, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, vs. CITY OF CONCORD, et al., Defendants.	No. C-93-1297 WHO ORDER

Good cause appearing,

IT IS HEREBY ORDERED that:

1. Defendant City of Concord's motion for partial summary judgment on plaintiff's first cause of action for violation of Title VII is DENIED.

2. Defendant City of Concord's motion for partial summary judgment on plaintiff's claim for punitive damages is GRANTED.

3. Defendant Byron Campbell's motion for partial judgment on the pleadings as to plaintiff's first cause of action for violation of Title VII is GRANTED.

Plaintiff, Rita Ellen Hardin, argues that Campbell can still be held liable for injunctive relief under Title VII, but Hardin did not assert a claim for injunctive relief in her original complaint. She left the employ of the City on September 2, 1992, and Campbell is no longer Mayor. Were Hardin permitted to amend her complaint at this late date only four weeks before trial, she would unfairly prejudice

Campbell's position because additional discovery would surely have to take place.

4. Defendant Campbell's motion for partial judgment on the pleadings as to plaintiff's sixth and seventh causes of action for intentional and negligent misrepresentation is GRANTED.

Although the Court granted Campbell's motion for judgment the pleadings, it DENIES Hardin's proposed motion to amend the complaint to add other claims "collateral" to her employment contract that induced her to accept employment as City Manager for the reason that it is too late in the day with trial only four weeks away to no assert new claims that would sure entail further discovery and postponement of trial.

5. Defendant Campbell's motion for partial judgment on the pleadings as to plaintiff's eighth cause of action for intentional interference with contractual relations is GRANTED.

6. The City of Concord and Campbell's motion to dismiss Hardin's pendent state claims is DENIED.

The Court will issue a Memorandum Decision and Order shortly.

Dated: August 31, 1994.

/s/
William H. Orrick
United States District Judge

DECISION OF THE NINTH CIRCUIT, FILED DECEMBER 7, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEIL S. HARDIN, Administration of Rita Ellen Hardin's estate, Plaintiff-Appellee, v. CITY OF CONCORD, Defendant-Appellant.	No. 96-16213 D.C. NO. CV 93-1297 WHO ORDER

Before: T.G. NELSON, THOMAS and SILVERMAN, Circuit Judges.

The panel has voted to deny the petition for rehearing. The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JUDGMENT OF THE UNITED STATES DISTRICT COURT, FILED MAY 8, 1996

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, vs. CITY OF CONCORD; BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendants.	No. C-93-1297 WHO JUDGMENT ON JURY VERDICT AGAINST DEFENDANT CITY OF CONCORD

This action came on for trial before the Court and a jury, The Honorable William H. Orrick, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that:

1. Defendant Byron Campbell's actions created a hostile or abusive working environment for plaintiff Rita Hardin based on her sex.

2. Defendant Byron Campbell was an agent of defendant City of Concord, or defendant Campbell was plaintiff's supervisor.

3. Defendant City of Concord knew or should have known of the conduct by defendant Byron Campbell and failed to take immediate and appropriate corrective action.

4. Plaintiff opposed alleged sexual harassment.

5. Defendant City of Concord thereafter took adverse employment action against plaintiff.

6. The adverse employment action was caused by plaintiff's opposition to alleged sexual harassment.

7. Defendant City of Concord would not have taken the same adverse employment action concerning plaintiff even if an unlawful retaliatory motive were not present.

8. Plaintiff was wrongfully constructively terminated by defendant City of Concord.

9. Plaintiff's economic damages attributable to her claims are six hundred thirty-one thousand dollars ($631,000).

10. Plaintiff's noneconomic damages attributable to her claims are six hundred thousand dollars ($600,000).

Dated: May 8, 1996.

/s/
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, ET AL., Plaintiff.	No: C 93 1297 WHO MRS. HARDIN'S RESPONSE TO DEFENDANT CAMPBELL'S MOTION IN LIMINE NO. 33 TO EXCLUDE ALL EVIDENCE REGARDING LETTERS CRITICAL OF MRS. HARDIN OTHER THAN STIPULATION ADOPTED IN PRIOR TRIAL Trial Date: November 13, 1995 Pretrial Conference: November 2, 1995, 2:00 p.m. Judge: Hon. William H. Orrick
AND RELATED CROSS-CLAIM.	

Plaintiff Rita Hardin has no opposition to the Court enforcing the terms of the stipulation put in place at the first trial, but wants to ensure that all parties have the same understanding of the scope of the stipulation.

At the first trial, Mrs. Hardin sought to introduce a package of newspaper articles and letters—written both before and after the publication of the Kay and Stevens report—that were critical of Mrs. Hardin. All but a very small number of the critical letters were written after the Kay and Stevens report. After reviewing the letters, the Court indicated its intention not to admit all of the letters but agreed to admit three letters, chosen by the parties or at random by the Court to be received in evidence as representative of all of the letters. The Court also agreed to receive in evidence the comparative number of the letters written before and after the publication of the Kay Stevens report and agreed that Mrs. Hardin's counsel could "cross-examine Mr. Campbell on his awareness of the breadth of the letters . . . and whether he had a relationship to the people who wrote the letters. (4 RT 2-6.)[1]

Thereafter, all parties, through their counsel, agreed to a two-part stipulation regarding the letters and newspaper articles critical of Mrs. Hardin. A copy of the full stipulation is attached as Exhibit 1. Part one of the stipulation consisted of a fact stipulation to be read to the jury the second part, concerning the scope of examination with other witnesses provided:

None of the letters or articles critical of plaintiff Rita Hardin will be admitted at trial and none of the letter writers will be subpoenaed at trial. The parties will be permitted, however, to examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims by unlawful harassment and retaliation by defendants in the spring of 1992. This examination will not include any questions regarding the authenticity of the letters or the relationship of the letter-writers to Byron Campbell.

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[1]See Exhibit A, Declaration of Sandra D. Peterson in Support of Plaintiff s Opposition to Campbell's Motion in Limine No. 33.

Mrs. Hardin agrees that this stipulation should be followed at the retrial.

Mrs. Hardin wants to confirm, however, that pursuant to the stipulation she will be able to examine other witnesses on the subject of the letters relating to her claims of unlawful harassment and retaliation by defendants in the spring of 1992. Moreover, Mrs. Hardin is entitled, pursuant to the stipulation, to question Byron and others about statements in newspaper articles that were attributed to him.

Dated: October 21, 1995

Respectfully submitted,

LINDA E. SHOSTAK
MARK R. McDDONALD
SANDRA D. PETERSON
MORRISON & FOERSTER

By: /s/
Sandra D. Peterson
Attorneys for Plaintiff
RITA ELLEN HARDIN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, Defendant	Case No. C 93 1297 WHO DEFENDANT CITY'S NOTICE OF JOINING IN DEFENDANT CAMPBELL'S MOTION IN LIMINE NO. 33 TO EXCLUDE ALL EVIDENCE RE: LETTERS CRITICAL OF PLAINTIFF OTHER THAN STIPULATION ADOPTED AT PRIOR TRIAL
CITY OF CONCORD, Cross-Claimant, v. BYRON CAMPBELL, Cross-Defendant.	Trial Date: November 13, 1995 Pretrial Conf: November 2, 1995 2:00 p.m. Judge: Honorable William H. Orrick

Defendant City hereby joins in Defendant Campbell's Motion in Limine No. 33 to Exclude All Evidence Re: Letters Critical of Plaintiff Other Than Stipulation Adopted at Prior Trial. Defendant City adopts by reference all pleadings

and draft orders filed by Defendant Campbell in connection with such Motion.

Dated: October 25, 1995

Respectfully submitted,

WHITMORE, JOHNSON & BOLANOS

By: /s/
RICHARD S. WHITMORE
KATHRYN J. BURKE
NANCY J. CLARK
Attorneys for Defendant
CITY OF CONCORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	Case No: C-93-1297 WHO DEFENDANT CAMPBELL'S MOTION IN LIMINE NO. 33 TO EXCLUDE ALL EVIDENCE REGARDING LETTERS CRITICAL OF PLAINTIFF OTHER THAN STIPULATION ADOPTED IN PRIOR TRIAL
AND RELATED CROSS-ACTIONS	Pre-Trial Conference: November 2, 1995 Trial: November 13, 1995

INTRODUCTION

Defendant Byron Campbell (Campbell) hereby moves in limine for an order precluding the admission of any evidence, or comment by counsel regarding Defendant Campbell's alleged participation in a hostile letter writing campaign in the second trial beyond the scope of the stipulation put in place at the prior trial. This action is based upon the following points:

1. Plaintiff has never offered any proof that Mr. Campbell participated in any hostile letter writing campaign. The basis for this allegation in the complaint is her speculation, not admissible evidence;

2. The court, at the first trial of this lawsuit, strongly urged the parties to reach a fact stipulation on this subject. To avoid what would amount to literally a separate trial on this matter, with as many as forty or so witnesses testifying about letters which appeared in local newspapers, the parties reached a fact stipulation attached as Exhibit A hereto;

3. Prior to reaching the stipulation, Ms. Hardin had already testified about the number of negative newspaper articles and letters that appeared in the newspapers after the Kay & Stevens investigation and introduced an exhibit consisting of certain newspaper articles and testified the persons who wrote such letters were Mr. Campbell's "supporters". (*See* Exhibit 3 hereto.)

4. Defendant Campbell reasonably believed in preparation of his trial witness and exhibit list that such issues would be dealt with in this trial as they had in the prior trial. Plaintiff's attorney though informed his counsel on October 4, 1995 that she was not prepared to utilize the prior stipulation (or at least as of that date was not prepared to agree to it), and thus the issue of how all of this evidence will be handled is again in flux and must be resolved prior to the commencement of the second trial.

ARGUMENT

I.

THE PRIOR STIPULATION SHOULD BE BINDING UPON THE PARTIES IN ANY SUBSEQUENT TRIAL.

Use of stipulations is encouraged by the courts as a means of making efficient use of trial time. *People v. Morris* (1991) 53 Cal.3d 152, 190, 279 Cal. Rptr. 720,740. The use of stipulations is especially important in situations such as this one in which the court intends to fix time limits for the parties to present their case.

It is well established law that a party is bound by a stipulation made in a prior trial in a subsequent trial, unless

the court permits withdrawal of the stipulation. *Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal-2nd 749,755, 214 Pac.2d 809, 812; See also California Practice Guide, Civil Trials and Evidence, Section 8.984, Rutter Group (1995). Plaintiff may not unilaterally withdraw from the stipulation. She may apply to the court for leave to withdraw from it, subject to a showing of justification, *i.e.* an offer of proof, as to why there is a justification for withdrawal of the stipulation. There has been no such motion made, and without an order granting relief from the previous stipulation, the prior stipulation remains binding.

II.

THE EFFECT OF THE STIPULATION ON THE ADMISSIBILITY OF OTHER EVIDENCE RELATING TO LETTER WRITING.

The court may recall that at the first trial the stipulation regarding letter writing was not reached until after Ms. Hardin had completed her testimony. During the course of her direct examination she testified in some detail about "negative" newspaper articles and letters that appeared in local newspapers. She assails Mr. Campbell's "supporters" as being behind the letter writing campaign. (*See* Exhibit B.) It was only because the stipulation had not been reached that such testimony was admissible. The court later precluded Mr. Campbell from rebuttal testimony because the stipulation was negotiated by the time of testimony. The sequence of witnesses in the prior trial allowed Ms. Hardin a "free shot" at Mr. Campbell on this issue because Mr. Campbell testified after the stipulation was arrived at. Moreover, after the stipulation was arrived at and read to the Jury, Mr. Campbell did not ask that Ms. Hardin's earlier testimony be stricken because he did not wish to draw an undue attention to it. The stipulation reached greatly limited the scope of other evidence as follows:

> None of the letters or articles critical of plaintiff Rita Hardin will be admitted at trial and none of the letter writers will be subpoenaed at trial. The parties will be permitted, however, to examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims of unlawful harassment and retaliation by defendants in the spring of 1992. This examination will not include any questions regarding the authenticity of the letters or the relationship of the letter writers to Byron Campbell.

The stipulation expressly excludes other evidence on "the relationship of the letter writers to Mr. Campbell". If the stipulation had been reached prior to Ms. Hardin's testimony about the number of newspaper articles and letters and Mr. Campbell's "supporters" writing such letters, such testimony would have been properly excluded under the stipulation. Defendant Campbell therefore submits that such testimony must be excluded at the second trial based upon the terms of the stipulation reached.

III.

IF THE COURT ALLOWS THE STIPULATION TO BE WITHDRAWN, THEN SUPPLEMENTATION OF THE TRIAL EXHIBIT LIST IS APPROPRIATE AND HAS BEEN STIPULATED TO BY PLAINTIFF'S COUNSEL.

Finally, Defendant Campbell's counsel prepared a revised trial exhibit list for this trial in September, 1995 before learning of the possibility that the plaintiff would seek to unilaterally withdraw from the letter writing stipulation. On October 9, 1995 after exchanging witness and exhibit lists, Mr. Glaessner wrote to and spoke with Ms. Shostak about her intentions. Ms. Shostak at that time indicated that she was still considering evidence from the prior trial and her options regarding letter writing stipulation. Mr. Glaessner indicated that if plaintiff's counsel was not agreeing to the

stipulation in the second trial, then it would require the Defendant Campbell to supplement his trial exhibit list by including a number of exhibits withdrawn from the exhibit list in anticipation that all evidence on the authenticity of the letters would be by way of the previously agreed stipulation. However, Ms. Shostak agreed that the defendant should be permitted to supplement the list, and it is expected that the parties will work out the details prior to trial, if necessary.

CONCLUSION

Accordingly, Defendant Campbell requests an order in limine as follows: (1) That the terms of the letter writing stipulation be deemed binding on the parties in the second trial and (2) For the exclusion of any testimony that would be excluded based upon the terms of that stipulation.

DATED: October 18, 1995

HARDIN, COOK, LOPER,
ENGEL & BERGEZ

By /s/
PETER O. GLAESSNER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendants. And Related Cross-Claim.	No: C 93 1297 WHO STIPULATION RE LETTERS AND NEWSPAPER ARTICLES CRITICAL OF RITA HARDIN

The parties hereby stipulate that the following procedure should be used regarding the newspaper articles and letters critical of Rita Hardin. This stipulation is in two parts. The first part consists of a fact stipulation to be read to the jury. The second part concerns the scope of examination with other witnesses (no letter writers will be called) concerning Mrs. Hardin's claims regarding retaliation in the spring of 1992.

PART I

Before the City Council adopted Resolution 92-16, there were 3 articles of letters critical of Mrs. Hardin which

appeared in newspapers in the first eighteen months of her job as City Manager.

After the resolution, there were 57 letters printed in newspapers critical of the City Manager and/or the City of Concord government between January and June, 1992. In this period, 29 different persons wrote 48 separate letters. Nineteen of these letters were sent to and published in two different newspapers, resulting in a total of 67 letters being published.

There were five newspaper articles which appeared in newspapers critical of the City Manager and/or the City of Concord government between January and June, 1992.

Defendant Byron Campbell was personally acquainted with a number of individuals who wrote some of these letters, through social and political connections. Defendant Byron Campbell would deny, under oath, that he wrote any of the letters in question, or that he encouraged any of the letter writers to write letters critical of plaintiff Rita Hardin. If the letter writers were called to the witness stand, they would deny under oath that defendant Byron Campbell wrote any of the letters in question or were encouraged by him to write such letters. Some of the letters came from persons who did not live in Concord. Two individuals whose names appear in letters deny they write such letters.

PART II

None of the letters or articles critical of plaintiff Rita Hardin will be admitted at trial and none of the letter writers will be subpoenaed as trial witnesses. The parties will be permitted, however, to examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims of unlawful harassment and retaliation by defendants in the spring of 1992. This examination will not include any

questions regarding the authenticity of the letters or the relationship of the letter writers to Byron Campbell.

Dated: October 17, 1994

LINDA E. SHOSTAK
LAURA V. BEST
SANDRA D. PETERSON
MORRISON & FOERSTER

By /s/
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Attorneys for Plaintiff
RITA ELLEN HARDIN

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WHITMORE, JOHNSON & BOLANOS

By /s/
Richard C. Whitmore
Attorneys for Defendant
CITY OF CONCORD

PETER O. GLAESSNER
GAYLYNN R. KIRN

HARDIN, COOK, LOPER, ENGEL & BERGEZ

By /s/
Peter O. Glaessner
Attorney for Defendant
BYRON CAMPBELL

THE COURT: GOOD MORNING, COUNSEL.

NOW, I READ THE STIPULATION, AND THIS IS GOING TO BE INTRODUCED IN EVIDENCE, AND NOTHING MORE, WITH RESPECT TO THE LETTERS.

MR. GLAESSNER: YOUR HONOR, IF I MAY —

THE COURT: IT'S THE PLAINTIFF FIRST.

MS. SHOSTAK: OKAY. AS I UNDERSTAND FROM WHAT YOUR HONOR WAS TALKING TO US ABOUT LAST WEEK, THE LETTERS—THIS WOULD GO INTO EVIDENCE IN LIEU OF THE ACTUAL LETTERS. I FURTHER UNDERSTOOD FROM LAST WEEK THAT THAT DID NOT BAR US FROM—ME ASKING MR. CAMPBELL ABOUT LETTERS, AND WHETHER HE HAD ANY CONNECTION TO THE LETTERS, OR THE LETTER WRITING. BUT THIS—THIS STIPULATION WOULD SERVE AS A SUBSTITUTE FOR ACTUALLY SUBMITTING THE LETTERS.

THE COURT: ALL RIGHT. THE MINUTE YOU ASK MR. CAMPBELL ABOUT HIS RELATIONSHIPS, HE'S ENTITLED TO CALL ADDITIONAL LETTER WRITERS, AND THAT PUTS US RIGHT BACK AT SQUARE ONE. AND I'M NOT ABOUT TO DO THAT. MR. CAMPBELL IS CONCERNED ABOUT THAT, AND HAS FILED A MEMORANDUM—PERHAPS YOU'VE SEEN IT; I JUST SAW IT A FEW MINUTES AGO—ASKING THAT MR. CAMPBELL HAVE PERMISSION TO CALL CERTAIN OF THE LETTER WRITERS HIMSELF. AND AGAIN, I HAVE NO INTENTION OF GRANTING THAT; THAT TAKES US RIGHT BACK TO SQUARE ONE, AND THAT'S THE REASON THAT I KEPT THOSE LETTERS OUT. THE MINUTE I PERMIT THAT KIND OF TESTIMONY, WE'RE GOING TO HAVE, PROPERLY SO, TESTIMONY FROM OTHER LETTER

WRITERS, WHO'LL BE CALLED BY THE PLAINTIFF, AND I'VE RULED THAT OUT.

MS. SHOSTAK: YOUR HONOR, LAST WEEK YOU WERE ALSO TALKING ABOUT THE POSSIBILITY THAT IF WE REACHED THIS KIND OF STIPULATION, YOU WOULD THEN SELECT AT RANDOM THREE LETTERS FROM—FROM THE PILE, AND WE COULD—AS I UNDERSTOOD YOUR HONOR, WE COULD —

THE COURT: YES.

MS. SHOSTAK: —DO WHAT WE WANTED TO WITH RESPECT TO—TO THOSE THREE LETTERS.

THE COURT: YES.

MS. SHOSTAK: SO IT MIGHT BE THAT ONCE YOUR HONOR —

THE COURT: UNLESS YOU WANT TO REST ON THE STIPULATION.

MS. SHOSTAK: WELL, I MAY HAVE MISUNDERSTOOD, YOUR HONOR. I THOUGHT—I THOUGHT I HEARD YOUR HONOR LAST WEEK, THAT, ONE, THERE WOULD BE A STIPULATION AS TO THE NUMBER, AND THEN IF WE REACHED THAT STIPULATION, THEN FROM THAT COLLECTION, YOU WOULD PULL THREE. I MAY HAVE—I MAY HAVE MIS—I MAY HAVE MISUNDERSTOOD.

THE COURT: NO, THAT THAT WAS MY SUGGESTION.

MS. SHOSTAK: OKAY.

THE COURT: I WAS JUST —

MS. SHOSTAK: AND I —

THE COURT:—HOPING THAT YOU WON'T TAKE THE SECOND PART OF THE SUGGESTION, THAT'S ALL.

MS. SHOSTAK: ALL RIGHT. LET'S—LET ME DO THIS, YOUR HONOR. I HAVE NOT READ MR. CAMPBELL'S PAPERS. WE HAD AGREED BEFORE YOU CAME OUT THAT WHAT WE WOULD

DO IS WE WOULD DEFER THIS UNTIL I COULD READ THE PAPERS, AND WE WILL COME TO COURT TOMORROW WITH A CLEAR PROPOSAL, OR A CLEAR POSITION FOR BOTH OF US, AND THEN YOUR HONOR—YOUR HONOR WILL HAVE WHAT YOU NEED TO RULE. YOU ALREADY HAVE, BUT WE'LL—WE'LL GIVE YOU OUR POSITION TOMORROW MORNING. HOW IS THAT?

THE COURT: THAT'S PERFECTLY SATISFACTORY.

MS. SHOSTAK: OKAY.

* * * *

MR. GLAESSNER:—I APOLOGIZE. MAY I GO BACK TO THE ISSUE OF THE STIPULATION FOR ONE MINUTE—

THE COURT: YES.

MR. GLAESSNER: —JUST TO MAKE CLEAR OUR POSITION AT THIS POINT.

THE COURT: YES.

MR. GLAESSNER: OUR POSITION —

THE COURT: COME UP TO THE LECTERN, IF YOU WOULD, PLEASE.

MR. GLAESSNER: YES, YOUR HONOR.

MR. CAMPBELL'S POSITION HAS BEEN THAT THE LETTERS SHOULD NOT COME INTO EVIDENCE AT ALL; WE'VE OBJECTED TO THAT ON GROUNDS OF RELEVANCY AND FOUNDATION. AT YOUR HONOR'S REQUEST AND DIRECTION, WE HAVE PREPARED THE STIPULATION REGARDING THE NUMBER OF LETTERS. I JUST WANT TO MAKE CLEAR FOR THE RECORD, WE'RE NOT WAIVING ANY OF OUR PRIOR OBJECTIONS REGARDING THOSE LETTERS, BUT AT YOUR HONOR'S REQUEST, WE'VE ATTEMPTED TO CRAFT A STIPULATION THAT—THAT MEETS WHAT YOUR HONOR HAS DIRECTED US TO DO. I JUST WANT TO MAKE THAT CLEAR FOR THE RECORD.

I AGREE WITH MS. SHOSTAK THAT THERE ARE OTHER ISSUES THAT WE WILL TRY TO ADDRESS BETWEEN NOW AND TOMORROW REGARDING THE LETTERS, BUT WE BELIEVE, AND CONSISTENT WITH OUR MEMORANDUM, THERE ARE SOME SERIOUS ISSUES HERE, BECAUSE THE JURY'S ALREADY HEARD OF THIS NUMERICAL DISTINCTION BETWEEN THESE LETTERS, AND TO SIMPLY TO LEAVE IT AT THAT, I THINK CREATES A VERY MISLEADING IMPRESSION.

THE COURT: NOW, YOU SAY THAT DURING DIRECT EXAMINATION THE PLAINTIFF RAISED THE ISSUE THAT 74 LETTERS CRITICAL OF HER WERE WRITTEN.

MR. GLAESSNER: THAT'S CORRECT, YOUR HONOR. AND THAT'S WHAT I BELIEVE HAPPENED. THE TESTIMONY WAS THAT THERE WERE THREE LETTERS OR ARTICLES PRIOR TO JANUARY OF 1992, AND 74 THEREAFTER IN A SIX-MONTH PERIOD. AND—AND WHILE CERTAINLY MS. HARDIN GAVE THAT TESTIMONY WITHOUT DIRECT REFERENCE TO THESE LETTERS, THE JURY HAS NOW HEARD THAT NUMERICAL DISTINCTION, AND I DON'T THINK, WITHOUT LETTING THE DEFENSE GO BACK INTO THAT, TO SOME DEGREE, AT LEAST, WITH RESPECT TO THESE LETTER WRITERS, IS EQUITABLE UNDER THE CIRCUMSTANCES. THERE'S A—THERE'S A STIGMA NUMERICALLY THAT'S BEEN CREATED IN THESE JURORS' MINDS ABOUT THAT, EVEN THOUGH THERE'S BEEN NO FOUNDATIONAL SHOWING THAT MY CLIENT HAD ANYTHING TO DO WITH THAT.

THE COURT: ALL RIGHT, MS. SHOSTAK.

MS. SHOSTAK: SIMPLY, YOUR HONOR, I JUST WANT TO MAKE CLEAR ALSO THAT WE HAVE OUR POSITION ABOUT WHAT WE WOULD LIKE TO PUT INTO EVIDENCE, BUT I UNDERSTOOD THAT YOUR

HONOR HAD ALREADY INDICATED THAT WE WERE GOING—NOT GOING TO GET OUR TOTAL WAY, AND SO CONSISTENT WITH WHAT MR. GLAESSNER SAID, THIS DIALOGUE WE'RE HAVING IS IN LIGHT OF THE FACT THAT YOUR HONOR ALREADY HAS MADE SOME PRELIMINARY RULINGS.

THAT'S JUST TO SAY THAT WE WOULD LIKE TO PRESERVE OUR RECORD—OUR POSITION FOR THE RECORD, AS WELL AS, HAVING UNDERSTOOD YOUR HONOR, WE'RE—WE'RE WORKING TOWARDS HOPEFULLY A MIDDLE GROUND THAT WILL BE ACCEPTABLE TO —

THE COURT: WELL, WHY DON'T YOU TRY, IN TRYING TO UNDERSTAND HIS HONOR, SIT DOWN WITH COUNSEL THIS AFTERNOON AND TALK AGAIN ABOUT THE—

MS. SHOSTAK: WE WILL—

THE COURT: —STIPULATION. I DON'T THINK—A STIPULATION IS ONLY AS GOOD AS THE LAWYERS' AGREEMENT TO STIPULATE, AND I DON'T LIKE THE IDEA THAT THE COURT'S FORCING ANYBODY TO STIPULATE TO ANYTHING IN THE CASE. I DON'T MIND RULING ON MATTERS, AND I'LL RULE ON THEM WITH SECTION—FEDERAL EVIDENCE RULE 403 VERY MUCH IN MIND.

MS. SHOSTAK: I UNDERSTOOD THAT, YOUR HONOR. WE WILL DO THAT THIS AFTERNOON. YOUR HONOR.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	Case No: C-93-1297 WHO MOTION IN LIMINE RE: ADMISSIBILITY OF TESTIMONY RE: PLAINTIFF'S CONTENTION THAT CERTAIN LETTERS TO THE EDITOR WERE FABRICATED AND EVIDENCE OF THE RELATIONSHIPS BETWEEN CAMPBELL AND CERTAIN OF THE LETTER WRITERS
AND RELATED CROSS-ACTIONS	

INTRODUCTION

Defendant Byron Campbell ("Campbell") hereby moves the Court, in limine, for an order allowing the defense to question plaintiff Rita Hardin about certain statements she made during her deposition testimony that certain letters to the editor were "fake", not written by the purported authors and that Bryon and Elaine Campbell were involved in the writing of the letters. In addition, defendant Campbell seeks permission from the Court to offer the testimony of the two authors in connection with plaintiff's claim of fabrication to rebut this claim.

The Court ruled on October 6, 1994 that it would not admit the 67 or so letters contained in Exhibit 302, but would randomly select three letters and that those persons might testify only. While recognizing the concern for cumulative evidence, defendant Campbell requests that the Court rule, prior to the completion of plaintiff's cross-examination that he may additionally call two "letter writers" to rebut a claim that their letters were written by defendant Campbell. It is necessary for the Court to address this matter now, so that defendant Campbell knows if this will be permitted *prior* to opening this door in cross-examination.

Finally, defendant Campbell seeks permission to examine plaintiff on cross-examination regarding her understanding of the relationship between Mr. Campbell and certain of the letter writers as plaintiff has opened the door on this issue on direct.

ARGUMENT

During plaintiff's deposition, she provided testimony that she believed that certain of the letters to the editor critical of her were fabricated or not written by the purported authors in connection with her claim of alleged retaliation. Specifically, she stated that a police officer, Dan Siri had told her that some of the letters were "fake" in that his aunt signed a letter under another name (Betty Christensen/Betty Bruno) and that the Campbell's were somehow involved. (*See* pages 460-468 of Plaintiff's deposition, attached hereto as Exhibit A). In addition, plaintiff testified that certain letters written by Jason Wood were fake as she believed that Mr. Wood was a fourteen-year-old not capable of writing such letters. (*See* pages 475-476 of Plaintiff's deposition, attached hereto as Exhibit B).

Defendant Campbell should be allowed to both examine plaintiff on these claims and to be able to then examine rebuttal witnesses on this issue as plaintiff has opened the door to the claim of a hostile letter-writing campaign by

describing in a vague way, the reasons for her belief that there was a campaign against her. The only way to effectively rebut this issue is to discuss the specific claims, such as the "fake" letter issue.

In addition, during direct examination, plaintiff raised the issue that "seventy-four" letters critical of her were written in the relevant time frame and that Mr. Campbell had social or political relationships with many of the authors. The only way defendant Campbell can effectively cross-examine plaintiff on this issue is by asking specific questions about plaintiff's understanding of defendant Campbell's relationships with certain of the authors. This would require defendant Campbell to identify the names of the authors and represent that fact to the jury, so that they understand the significance of the question. Because the letters themselves are not in evidence, defendant Campbell requests that the Court permit counsel to identify such persons as shown as the authors in Exhibit 302 for purposes of this examination.

Plaintiff opened the door on this issue on direct examination referring to these persons as Campbell's "supporters". Defendant Campbell requests that he be allowed to identify these persons by name during the cross-examination of plaintiff despite the fact that the letters themselves have not been admitted into evidence.

CONCLUSION

Based upon the foregoing, defendant Campbell moves the Court to allow the brief examination of plaintiff regarding her contention that certain letters to the editor were fabricated and to allow defendant Campbell to offer the testimony of the two authors to rebut this claim. Furthermore, defendant Campbell seeks permission from the Court to cross-examine plaintiff on her understanding of

defendant Campbell's relationship with certain of the authors for the reasons stated above.

DATED: October 11, 1994

HARDIN, COOK, LOPER,
ENGEL & BERGEZ

By /s/
GAYLYNN R. KIRN

MS. SHOSTAK: YOUR HONOR, WE DO HAVE ANOTHER ISSUE, AND THAT IS THE ISSUE OF THAT—THAT GROUP NEWSPAPER EXHIBIT YESTERDAY. ONE OF THE EXHIBITS, 220.93, I THINK HAS ALREADY COME INTO EVIDENCE, AND THAT'S THE SMALL EXHIBIT, THE EXHIBIT THAT CONSISTS OF THREE ARTICLES.

WE GOT DERAILED ON THE—ON THE LARGER EXHIBIT. COUNSEL NOW HAS THE LARGER EXHIBIT; WE HAVE LABELED IT A NEW NUMBER, 302, THOUGH IT CONSISTS OF—OF ARTICLES THAT THE PARTIES HAVE ALREADY SEEN.

I BELIEVE IT IS THE CASE THAT THE CITY OF CONCORD HAS NO OBJECTION TO 302, BUT MR. GLAESSNER DOES HAVE OBJECTIONS TO 302, SO I THINK THAT IT PROBABLY WOULD MAKE SENSE TO TALK ABOUT THAT NOW.

THE COURT: WELL, IS MY—IS MY PACKAGE—

MS. SHOSTAK: YOUR PACKAGE—YOUR PACKAGE IS THE CORRECT PACKAGE; WE'RE JUST NOW CALLING IT 302.

THE COURT: ALL RIGHT. AND SO—AND MR. CAMPBELL OBJECTS TO ALL OF IT OR PART OF IT?

MR. GLAESSNER: WE OBJECT TO ALL OF IT, BUT FOR SOMEWHAT DIFFERENT REASONS, YOUR HONOR. THE PACKAGE MARKED 302 NOW CONTAINS TWO NEWSPAPER ARTICLES, ONE FROM THE SAN FRANCISCO CHRONICLE AND THE OTHER FROM THE CONTRA COSTA TIMES, AND THEN IT CONSISTS OF A SERIES OF APPROXIMATELY 60 PAGES OF—OF LETTERS.

THE BASIS FOR THE OBJECTION IS DECIDEDLY DIFFERENT, AND I—I THINK AT LEAST WOULD WARRANT HAVING THEM MARKED SEPARATELY,

SO THAT I CAN MAKE THE OBJECTIONS FOR THE RECORD SEPARATELY.

MY OBJECTION AS TO THE NEWSPAPER ARTICLES VERY SIMPLY IS THIS, YOUR HONOR: WHILE I UNDERSTAND THAT MS. SHOSTAK IS OFFERING THE ARTICLES NOT FOR THE TRUTH OF THE MATTER, I BELIEVE THAT THERE ARE MANY STATEMENTS IN THESE ARTICLES WHICH ARE HEARSAY AND WHICH WOULD POSE A GREAT DANGER OF PREJUDICE TO MR. CAMPBELL IN THIS CASE. THE OBJECTIONS ARE REALLY BASED UPON RULE 403, MORE THAN A HEARSAY OBJECTION, ALTHOUGH THERE IS OBVIOUSLY HEARSAY. SO THOSE ARE THE OBJECTIONS AS TO THE TWO NEWSPAPER ARTICLES IN EXHIBIT 302.

AS TO THE LETTERS, THE OBJECTIONS HAVE TO DO WITH THE FACT THAT, WITHOUT FOUNDATION, MR. CAMPBELL REQUESTED THESE PEOPLE TO WRITE THESE LETTERS; THERE—THERE IS NO RELEVANCY TO THESE LETTERS IN THIS LAWSUIT. PEOPLE WRITE LETTERS ALL THE TIME, AND WE'VE ADDRESSED THAT PREVIOUSLY IN THE MOTIONS. BUT THE OBJECTIONS ARE DECIDEDLY DIFFERENT. I'M CONCERNED THAT IF IT'S OFFERED AS A GROUP EXHIBIT, MY OBJECTIONS ARE GOING TO BE VERY COMPOUND AND CONVOLUTED, REGARDLESS OF WHAT YOUR HONOR ULTIMATELY RULES ON, AND IT'S GOING TO BE VERY DIFFICULT TO—TO PULL THAT APART WHILE THE JURY'S HERE PRESENT.

THE COURT: THAT'S CERTAINLY CORRECT.

MS. SHOSTAK: ON THE MECHANICAL ISSUE, I WOULD HAVE NO PROBLEM WITH TAKING THE TWO NEWSPAPER ARTICLES OUT AND CALLING THEM 302A, SO I DON'T THINK WE HAVE A PROBLEM WITH THAT.

ON THE BIGGER ISSUE OF THE ADMISSIBILITY OF THE PACKET, WE THINK THE PACKET IS RELEVANT FOR TWO REASONS, YOUR HONOR. AND THIS HAD BEEN ADDRESSED TO SOME DEGREE IN THE MOTIONS IN LIMINE.

WE THINK THE INFORMATION—THE LETTERS TO THE EDITOR, LETTERS TO THE CITY COUNCIL, ARE RELEVANT BECAUSE THEY WERE PUBLISHED, THEY WERE IN THE COMMUNITY; MRS. HARDIN TALKED ABOUT THE PUBLICITY SHE WAS RECEIVING WITH THE CITY COUNCILMEMBERS, THEY HAD NOTICE OF IT, SEVERAL OF THEM SAID THEY THOUGHT THAT BYRON WAS BEHIND IT, AND YET THEY DID NOTHING.

SO THEY'RE NOT BEING OFFERED FOR THE TRUTH. GOODNESS KNOWS, WE DON'T WANT TO OFFER THEM FOR THE TRUTH; THEY'RE VERY CRITICAL OF MRS. HARDIN. THEY'RE OFFERED FOR THE FACT THAT THEY WERE PUBLISHED IN THE COMMUNITY AT THE TIME, "A PROBLEM AT CITY HALL." ALL RIGHT. THAT IS WITH RESPECT TO CONCORD.

WITH RESPECT TO MAYOR CAMPBELL, WE HAVE A CIRCUMSTANTIAL CASE THAT HE MAY HAVE INSPIRED THIS LETTER WRITING CAMPAIGN. AND SO THE FACT THAT THERE WERE THREE BEFORE THE RESOLUTION, AND THERE WERE 70 PLUS AFTER THE RESOLUTION, IS OUR CIRCUMSTANTIAL CASE. THE PEOPLE WHO WROTE THESE LETTERS ARE ASSOCIATED, VERY MANY OF THEM, WITH HIM IN ONE WAY OR ANOTHER.

SO I WOULD SUBMIT, WITH RESPECT TO MAYOR CAMPBELL, MR. GLAESSNER'S ARGUMENT GOES TO THE WEIGHT, RATHER THAN THE ADMISSIBILITY OF THE ARGUMENT—OF THE ARTICLES, BUT THEY COME IN FOR TWO

DIFFERENT PURPOSES FOR THE TWO DIFFERENT DEFENDANTS.

MR. GLAESSNER: YOUR HONOR, MAY I RESPOND JUST BRIEFLY?

THE COURT: YES.

MR. GLAESSNER: I THINK IN A NORMAL CASE, IN A TYPICAL LAWSUIT, IF I WERE IN MS. SHOSTAK'S POSITION, I'D BE MAKING EXACTLY THE SAME ARGUMENTS ABOUT THESE LETTERS, THAT—THAT IF SHE CAN LAY SOME CIRCUMSTANTIAL PLAN BEFORE YOU, THAT THEY MIGHT SOME WAY COME IN.

THERE'S AN ADDITIONAL PROBLEM IN THIS CASE THAT I—THAT I PERCEIVE, AND THAT IS THIS: ABSENT SOME—SOME FOUNDATIONAL BASIS THAT MR. CAMPBELL EITHER WROTE THESE LETTERS, OR THAT—THAT HE SOLICITED THESE LETTERS TO BE WRITTEN TO LET THE LETTERS COME IN UNDER THE GUISE OF CIRCUMSTANTIAL EVIDENCE IS REALLY, IN MY JUDGMENT, STARTING TO GET VERY CLOSE TO INFRINGEMENT UPON FIRST AMENDMENT RIGHTS, BECAUSE LATER ON, IF NEEDED, THESE PEOPLE WILL COME IN AND EXPLAIN WHAT THEY DID, IN TERMS OF WRITING THESE LETTERS.

BUT THE—THE NOTION THAT BY ASSOCIATION, THAT BY MR. CAMPBELL'S ASSOCIATION WITH THESE PEOPLE, WHICH, IN MANY RESPECTS, WE DON'T DISPUTE, THAT—THAT HE SOMEHOW COULD BE CHARGED IN THIS CASE WITH INSTIGATING A HOSTILE LETTER WRITING CAMPAIGN, I THINK IT VIOLATES MR. CAMPBELL'S FIRST AMENDMENT RIGHTS—I THINK IT ALSO POTENTIALLY VIOLATES THESE OTHER PEOPLES' RIGHTS, BUT IT'S MR. CAMPBELL'S RIGHTS IN THIS CASE THAT ARE AT ISSUE—AND THAT'S THE ADDITIONAL CONCERN ABOUT A

CIRCUMSTANTIAL EVIDENCE CASE WITH THESE LETTERS.

THE COURT: ALL RIGHT. THE MATTER'S UNDER SUBMISSION, AND I'LL DECIDE IT AFTER YOU RENUMBER MY PAGES HERE.

MS. SHOSTAK: MAY I COME UP AND GET THAT, YOUR HONOR?

THE COURT: SALLY, WILL YOU PLEASE HAND THAT TO COUNSEL.

MS. SHOSTAK: YOUR HONOR, IT VERY WELL MAY BE THAT I'LL BE FINISHED WITH MY DIRECT BEFORE YOUR HONOR HAS AN OPPORTUNITY TO RULE, SO I ASSUME THAT WE'LL BE ABLE TO REOPEN FOR THAT PURPOSE —

THE COURT: YES. YES.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendants.	No: C 93 1297 WHO PLAINTIFF'S OPPOSITION TO DEFENDANT CAMPBELL'S MOTIONS IN LIMINE NOS. 2-5, 11, 12, AND 18, AND TO DEFENDANT CITY'S MOTION IN LIMINE NO. 8
And Related Cross-Claim.	Trial Date: October 3, 1994 Pretrial Conf: Sept. 22, 1994 2:00 p.m. Judge: Honorable William H. Orrick

I. INTRODUCTION

Defendant Campbell has publicly protested, "I wanted to get everything out in the open. I wanted to get the facts on the table where they could be evaluated in the plain light of the day;" "I'm glad this is all coming out. I tried to get this matter dealt with for the last year. I've heard rumors, and this action of calling this special investigator will provide an opportunity to clear up rumors and allegations against me;" and "I welcome the chance for this entire matter to be heard

in a court of law."[1] Yet, despite these protests, Campbell, by his motions, is now making every effort to suppress the evidence that Mrs. Hardin has discovered in this case that demonstrates that he has harassed and retaliated against her in violation of the anti-discrimination laws of this state.

Campbell attempts to characterize this evidence as hearsay or character evidence. In fact, it is not. Rather, the evidence to which Campbell objects in his Motions Nos. 2-5, 11, 12, and 18 will be offered, not for the truth of the matter asserted or to show character, but rather to prove other elements of Mrs. Hardin's sex discrimination claims: (1) Mrs. Hardin's receipt of complaints of discrimination based on race, sex, and sexual harassment, and retaliation; (2) notice to her employer, the City of Concord, and to Byron Campbell of complaints about Campbell's harassment and retaliation against Mrs. Hardin and others; (3) the City of Concord's failure to investigate and remedy these complaints and its apparent ratification of Campbell's conduct; (4) Byron Campbell's motive and intent to discriminate against Mrs. Hardin on the basis of her gender; (5) Byron Campbell's motive and intent to retaliate against Mrs. Hardin for her refusal to publicly vindicate him of these complaints; (6) Defendant City's motive and intent to discriminate and retaliate against Mrs. Hardin; (7) Mrs. Hardin's state of mind; (8) Byron Campbell's state of mind; and (9) for the demonstration required for an award of punitive damages. It is for these reasons that the evidence will be offered. Therefore, defendants' motions in limine to exclude this evidence is not well-founded.

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[1] *See* Exhibit A attached hereto.

II. ARGUMENT

* * * *

A. Campbell's Motion In Limine No. 11

In this Motion, Campbell seeks to preclude use of the term "fake letters" absent a proper foundational showing *outside* the presence of the jury. Once again, Campbell seeks to limit not only Mrs. Hardin's evidence but her language as well. Mrs. Hardin will present evidence at trial suggesting that Campbell orchestrated a hostile letter writing campaign against her. She will demonstrate that letters critical of her received by the press and by City Councilmembers contained false authors' names. She will also demonstrate that Campbell solicited such letters from his friends and associates. Mrs. Hardin alleges that this was part of Campbell's retaliation directed at her for her refusal to vindicate Campbell of the charges against him.

By his motion, Campbell attempts to usurp the jury's role in determining this issue based on the evidence presented. Furthermore, as Exhibit F demonstrates, Peter Glaessner, Campbell's attorney used the term "fake letters" in his questioning of Pat MacDonald, Rita Hardin, Mark DeSaulnier, Lloyd Mashore, Colleen Coll, Steve Jepsen, and Jean Underwood, and permitted similar questions without objections. Accordingly, Campbell has waived any objection to the form of these questions and the motion should be denied.

B. Campbell's Motion In Limine No. 12

By this Motion Campbell seeks to preclude use of the terms "hostile or negative letter writing campaign." This motion is nothing more than an extension of Campbell's Motion No. 11 and reflects a similar attempt to not only preclude Mrs. Hardin's introduction of evidence but to limit her language in talking about such evidence.

Mrs. Hardin will introduce evidence at trial that demonstrates that there was a concerted and coordinated effort to discredit her in the local newspapers through letters critical about her directed to the editor. She will also introduce evidence of Byron Campbell's connection to this campaign. Finally, she will offer this evidence as part of Campbell's ongoing retaliation against her for her refusal to publicly vindicate Campbell of the charges against him.

As in Campbell's Motion No. 11, Campbell attempts to usurp the role of the jury in determining issues of credibility, weighing circumstantial evidence, and reaching conclusions. Accordingly, Campbell's Motion No. 12 should be denied.

* * * *

III. CONCLUSION

For the reasons stated above, Mrs. Hardin respectfully requests that the Court deny Campbell's Motions In Limine Nos. 2-5, 11, 12, and 18, and the City of Concord's Motion In Limine No. 8.

Dated: September 9, 1994

LINDA E. SHOSTAK
LAURA V. BEST
SANDRA D. PETERSON
MORRISON & FOERSTER

By: /s/
SANDRA D. PETERSON
Attorneys for Plaintiff
RITA ELLEN HARDIN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, Defendant.	Case No. C 93 1297 WHO DEFENDANT CITY'S NOTICE OF JOINING IN DEFENDANT CAMPBELL'S (ELEVENTH) MOTION IN LIMINE TO PRECLUDE USE OF THE TERM "FAKE LETTERS", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY
CITY OF CONCORD, Cross-Claimant, v. BYRON CAMPBELL, Cross-Defendant.	Date: September 22, 1994 Time:2:00 p.m. Location: Courtroom D Judge: Honorable William H. Orrick

Defendant City hereby joins in the (Eleventh) In Limine Motion to Preclude Use of the Term "Fake Letters", or Synonymous Terminology Absent a Proper Foundational Showing outside the Presence of the Jury filed by Defendant Campbell in this matter. Defendant City adopts by reference

all pleadings and draft orders filed by Defendant Campbell in connection with such Motion.

Dated: September 9, 1994 Respectfully submitted,

WHITMORE, JOHNSON & BOLANOS

By: /s/
RICHARD S. WHITMORE
NANCY J. CLARK
KATHRYN J. BURKE
Attorneys for Defendant
CITY OF CONCORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, Defendant.	Case No. C 93 1297 WHO DEFENDANT CITY'S NOTICE OF JOINING IN DEFENDANT CAMPBELL'S (TWELFTH) MOTION IN LIMINE TO PRECLUDE USE OF THE TERM "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY
CITY OF CONCORD, Cross-Claimant, v. BYRON CAMPBELL, Cross-Defendant.	Date: September 22, 1994 Time:2:00 p.m. Location: Courtroom D Judge: Honorable William H. Orrick

Defendant City hereby joins in the (Twelfth) In Limine Motion to Preclude the Use of the Terms "Hostile or Negative Letter Writing Campaign", or Synonymous Termi-

nology Absent a Proper Foundational Showing outside the Presence of the Jury filed by Defendant Campbell in this matter. Defendant City adopts by reference all pleadings and draft orders filed by Defendant Campbell in connection with such Motion.

Dated: September 9, 1994

Respectfully submitted,

WHITMORE, JOHNSON & BOLANOS

By: /s/
RICHARD S. WHITMORE
NANCY J. CLARK
KATHRYN J. BURKE
Attorneys for Defendant
CITY OF CONCORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	CASE NO: C-93-1297 WHO MOTION IN LIMINE TO PRECLUDE USE OF THE TERM "FAKE LETTERS", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY No. 11 Pre-trial Conference: September 22, 1994 Trial Date: October 3, 1994
AND RELATED CROSS-ACTIONS	

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Defendant Byron Campbell (Campbell) hereby moves the Court, in limine, for an order prohibiting any party, witness or attorney from referring to any letter(s) to the editor appearing in local newspapers as "fake" (or using synonymous words) without first making a proper foundational showing outside the jury's presence that Defendant Campbell wrote the letter or personally solicited the person whose name appears as the author to sign the letter(s).

The basis for this motion is that describing such letters as "fake" (or synonymous words] lacks a proper foundation, assumes facts not in evidence, is completely argumentative and inflammatory in the context of this trial, and would result in substantial, undue prejudice to the defendant. This motion is made under Federal Rule of Evidence (FRE) 104, 401, 402, 403, 602, 801 and 802.

ARGUMENT

A. PLAINTIFF'S TESTIMONY ON THIS SUBJECT MUST BE PROHIBITED BECAUSE SHE LACKS PERSONAL KNOWLEDGE THAT ANY LETTER IS FAKE.

Throughout the course of discovery in this lawsuit, Mrs. Hardin and her counsel have engaged in a calculated attempt to characterize a series of letters which appeared in local newspapers critical of her as "fake" letters. Plaintiff herself testified in her deposition that she believed several letters were "fakes" and had notated a chart referring to several letters as "fakes." She speculates that Mr. Campbell either wrote such letters or solicited others to write such letters. See Ex. A, Hardin deposition excerpt, filed under seal pursuant to confidentiality agreement. Her testimony is not based upon any personal knowledge (Hardin Deposition 457:7-9) but rather through discussions with other employees who purportedly told her that persons whose names appeared with the letters did not write several of them. Plaintiff herself lacks the required personal knowledge to testify on the subject, and her testimony must therefore be excluded. FRE 602, 801, 802.

B. THE TESTIMONY OF ANY OTHER WITNESSES REGARDING PURPORTED "FAKE" LETTERS MUST BE PRECLUDED ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY.

Plaintiff may nevertheless attempt to suggest through other witnesses that letters were "fakes" based upon her deposition testimony.[1] The court must likewise prohibit such testimony, interrogation of witnesses, comment or argument in the jury's presence absent a proper foundational showing of the basis for this factual assertion under FRE 104. These allegations are spurious and, if necessary, will be refuted at trial through the testimony of the various persons who actually wrote these letters; however, that puts the cart before the horse. Plaintiff's witnesses should not be permitted to testify or refer to such letters as "fakes" at all because they, too, lack the personal knowledge to make such an assertion. Her counsel should not be permitted to question witnesses implying that factual assertion, without first making the required factual showing through admissible evidence (and outside the presence of the jury) that any of the subject letters were, in fact, prepared or signed by persons who did not write those letters. (*See Skogan v. Dow Chemical* Co., 375 F.2d 692, 704 (CA Minn 1967): "Questions propounded to witnesses are objectionable if they are argumentative, misleading or assume facts not in evidence.")

Defendant Campbell submits that by requiring this foundational showing to be made that this will properly place the burden of proof where it belongs. FRE 301.

Plaintiff made this allegation that Defendant Campbell sponsored a "fake" letter writing campaign in the complaint (Paragraph 21) and must now be required to prove it through admissible evidence, not argument and speculation. (It

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[1]She identified three persons - Robert Bradshaw, Steve Jepsen and Dan Siri as possible witnesses on this subject. (Ex. A, p. 472.)

should be noted that Defendant Campbell attempted to resolve this issue short of trial at the close of discovery by propounding requests for admission as to 100 of the letters. Plaintiff refused to admit that Defendant Campbell did not write, sign or solicit each of the 100 letters attached to the requests for admission.) The issue here is also one of trial efficiency as well. Plaintiff should not be permitted to make broad, generalized assertions that there were "fake" letters published. She should be required to come forward with admissible evidence as to a specific letter or letters which she hopes to prove were "fakes", if any exist. The defendant should not be put to the task of calling some or all of the letter writers to refute a broad, generalized allegation that Defendant Campbell wrote, signed or personally solicited the writing of critical letters.

CONCLUSION

Defendant Campbell respectfully requests the Court to order in limine that Mrs. Hardin not be permitted to testify about "fake" letters to the editor (or use synonymous terminology) on the basis that she has no personal knowledge on the subject. Further, Defendant Campbell requests that the court order counsel not interrogate any witness, comment upon or refer in the presence of the jury to "fake" letters (or use synonymous terminology) without first laying a proper foundation establishing that as to a specific letter that it was not written or signed by the person whose name appears on the letter, and that such foundational

showing be made only through admissible evidence and outside the presence of the jury.

DATED: September 6, 1994

HARDIN, COOK, LOPER, ENGEL & BERGEZ

By /s/
PETER O. GLAESSNER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	CASE NO: C-93-1297 WHO MOTION IN LIMINE TO PRECLUDE THE USE OF THE TERMS "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY No. 12 Pre-trial Conference: September 22, 1994 Trial Date: October 3, 1994
AND RELATED CROSS-ACTIONS	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant Byron Campbell [Campbell) hereby moves the Court, in limine, for an order prohibiting any party, witness or attorneys from using the terminology "hostile or negative letter writing campaign" during the course of trial, including interrogation of any witness, the testimony by any witness, or commenting or using such terminology in the presence of the jury absent a proper foundational showing outside the presence of the jury establishing that Defendant Campbell wrote letters signing the name of someone else,

wrote letters for other persons to sign, or personally solicited persons to write a specific, critical letter(s).

The basis for this motion is that use of the terminology lacks foundation, assumes a fact not in evidence, is completely argumentative and conclusory. The use of such terminology, or synonymous words, during jury selection, argument, or during examination of the witnesses by counsel would be unduly prejudicial, confuse and mislead the jury, and should be prohibited under Federal Rules of Evidence 104, 401, 402, 403, and 602.

ARGUMENT

A. THE TERM "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN" LACKS FOUNDATION, ASSUMES FACTS NOT IN EVIDENCE, IS ARGUMENTATIVE, AND IS PREJUDICIAL TO DEFENDANT CAMPBELL.

Plaintiff alleges that Defendant Campbell "organized and participated in a campaign to discredit (her) . . . specifically, beginning in or about January, 1992, defendant Campbell solicited persons to write letters to the newspapers designed to discredit plaintiff and to damage her reputation as city manager." (Complaint, Para. 21(d).) There-has been no admissible evidence to support this allegation in discovery but, 'throughout the course of discovery, Rita Hardin's counsel has repeatedly interrogated witnesses (despite defense objections] about the existence of a "hostile letter writing campaign", implying that Defendant Campbell instigated or encouraged such a "campaign." (*See*, *e.g.*, Ex. A—Deposition testimony of Jared Zwickey Colleen Coll, Lloyd Mashore, Nancy Gore and Mark DeSaulnier all filed under seal pursuant to confidentiality agreement.)

It is improper to frame a question to imply a factual assertion which is absent from the evidence and patently argumentative. Plaintiff's attorney has repeatedly done this in depositions by asking questions similar in form to: "Did you investigate Ms. Hardin's belief in a hostile letter writing

campaign orchestrated by Mr. Campbell?", or some similarly-worded question.

Plaintiff's counsel has repeatedly described Defendant Campbell as being engaged in promoting a "campaign" of "hostile" or "negative" letters about Rita Hardin during 1992. The word "campaign" refers to a connected series of operations designed to bring about a particular result (Webster's Ninth New Collegiate Dictionary (1988)). Plaintiff obviously seeks to imply that Defendant Campbell was at the root of this "campaign". Use of the word "campaign" here improperly presumes or implies a concerted effort either to write letters for others to sign or, alternatively to personally solicit people to write letters that they would not have written of their own volition, or in the normal exercise of their First Amendment rights. Without any proper foundational showing that Mr. Campbell somehow wrote and signed letters using someone else's name, or wrote letters for other persons to sign or, solicited other persons to write letters to the editor critical of Rita Hardin or her job performance, the use of the term "campaign" both assumes facts not in evidence, is grossly argumentative, and highly prejudicial.

There is a similar problem with use of the words "negative" or "hostile" as adjectives to preface the words "letter writing". Those words, by themselves, are argumentative, conclusory and imply that the letters were written with some type of personal malice somehow emanating from the defendant. The mere fact that letters appeared in the newspaper critical of Ms. Hardin (just as letters appeared critical of Mr. Campbell, urging his resignation) is not by itself a proper foundational showing justifying the use of the hyperbolic label of a "negative" or "hostile" letter writing campaign" before the jury. The mere fact that some of the persons who wrote letters contributed to Defendant Campbell's political campaigns or knew him on a personal level is also wholly insufficient to show that there was a "hostile letter writing campaign". Even if it were established that letters may have been written by persons then signed by

someone else, that is of no relevance to this case unless it is first established as a foundational fact that *Defendant Campbell* was personally involved in those activities.

Plaintiff should not, on the basis of speculation and conjecture, be permitted to inflame the jury with unduly prejudicial questions about a "hostile letter writing campaign" absent a proper foundational showing prior to the subject being brought up in the jury's presence to avoid the obvious prejudice to the defendant. FRE 104. The court should therefore prohibit counsel from interrogating any witnesses, commenting or referring in the jury's presence to any "negative or hostile letter writing campaign" absent a proper foundational showing outside the presence of the jury.

DATED: September 6, 1994

HARDIN, COOK, LOPER,
ENGEL & BERGEZ

By /s/
PETER O. GLAESSNER

PERTINENT STATUTES AND REGULATIONS

2 U.S.C. § 1202. Discriminatory Practices Prohibited

(a) Practices.

All personnel actions affecting the Presidential appointees described in section 1219 of this title or the State employees described in section 1220 of this title shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of Title 42;

(2) age, within the meaning of section 633a of Title 29; or

(3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of Title 42.

(b) Remedies.

The remedies referred to in section 1219(a)(1) and 1220(a) of this title—

(1) may include, in the case of a determination that a violation of subsection (a)(1) or (a)(3) of this section has occurred, such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5k, and 2000e-16(d) of Title 42, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of Title 42;

(2) may include, in the case of a determination that a violation of subsection (a)(2) of this section has occurred, such remedies as would be appropriate if awarded under section 633a(c) of Title 29; and

(3) may not include punitive damages.

(Pub. L. 102-166, Title III, § 302, Nov. 21, 1991, 105 Stat. 1088; Pub. L. 104-1, Title V, § 504(a)(1), Jan. 23, 1995, 109 Stat. 40.)

2 U.S.C. §1220:

Coverage of previously exempt State employees

(a) Application.

The rights, protections, and remedies provided pursuant to section 1202 of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policy-making level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by administrative action

(1) In general.

Any individual referred to in subsection (a) of this section may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of Title 5, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) Referral to State and local authorities.

(A) Application.

Section 2000e-5(d) of Title 42 shall apply with respect to any proceeding under this section.

(B) Definition.

For purposes of the application described in subparagraph (A), the term "any charge filed by a member of the Commission alleging an unlawful employment practice" means a complaint filed under this section.

(c) Judicial review.

Any party aggrieved by a final order under subsection (b) of this section may obtain a review of such order

under chapter 158 of Title 28. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of Title 28.

(d) Standard of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) of this section if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 U.S.C. §630:

Definitions.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

42 U.S.C. §2000e:
Definitions.
For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

* * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §2000e-5:
Enforcement provisions.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

* * * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of

the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Cal. Gov't Code §34851:

Method of adoption of city manager ordinance.

An ordinance establishing a city manager form of government may be:

(a) Enacted by the legislative body; or

(b) Submitted to the electors by the legislative body at any municipal or special election; or

(c) Submitted by the people as an initiative measure.

Cal. Gov't Code §34856:

Power to dismiss and appoint other officers and employees.

The city manager may appoint and dismiss the chief of police and other subordinate appointive officers and employees except the city attorney. When the offices of city clerk and city treasurer are made appointive, appointments to such offices shall be made by the city council unless the city council vests such appointing power in the city manager by ordinance.

Cal. Gov't Code §36501:
Governing officers and employees.

The government of a general law city is vested in:

(a) A city council of five members.
(b) A city clerk.
(c) A city treasurer.
(d) A chief of police.
(e) A fire chief.
(f) Such subordinate officers or employees as are provided for by law.

Cal. Gov't Code §36506:
Appointive officers and employees; compensation; term.

By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees. Such officers and employees hold office during the pleasure of the city council.

Concord Municipal Code:
Article II, Chapter 2, §2206. Office of City Manager.

A. A City Manager shall be appointed by the City Council solely on the basis of an objective evaluation of his administrative qualifications; he need not be a resident of the City of Concord at the time of his appointment, and he shall hold office at the pleasure of the City Council. No person elected or appointed to membership on the City Council shall, subsequent to such election or appointment, be eligible for appointment as City Manager until one (1) year has elapsed following the expiration of the last term for which he was elected or appointed. (Ords. 227, 687)

B. In the event of an intended removal from office by the City Council, the City Manager shall be furnished with a written notice stating the Council's intention to remove him and the reason therefor at least thirty (30) days prior to the effective date of his removal. Within seven (7) days after the delivery to him of such notice, the City Manager, by written notification to the City Clerk, may

request a public hearing before the Council The Council shall then determine the time and date for such a hearing, which shall occur before the thirty (30) day period and at which time the City Manager shall appear and be heard. Subsequent to furnishing the City Manager with notice of intent, the Council may suspend him from duty without loss of salary until such time as his removal has been accomplished by resolution subsequent to the public hearing. The Council, in removing the Manager, shall exercise its uncontrolled discretion, its action shall be final and shall not be predicated upon any particular showing or degree of proof at the public hearing, the sole purpose of which is to allow the City Manager to present publicly his basis of opposition to his removal.

C. If required by the City Council, City Manager shall furnish a surety bond in such sum as the Council may determine. (Ord. 227)

§2207. General Authority of City Manager. Except for the purpose of inquiry, the City Council and its member shall deal with the administrative service solely through the City Manager, and neither the City Council nor any member thereof shall give orders to any of the subordinates of the City Manager. (Ord. 227)

§2208. Duties of City Manager. The City Manager shall be the administrative head of the City Government under the direction and control of the Council, except as otherwise provided for by ordinance. He shall be responsible to the City Council for the efficient administration of the affairs of the City which are under his control. In addition to the City Manager's general powers as administrative head, and not as a limitation thereon, he shall have the following duties:

(A) To see that all laws and ordinances are duly enforced; (Ord. 227)

(B) To employ, discipline, or remove all heads of departments and all subordinate officers and employees of

the City, to transfer employees from one department to another, and to consolidate or combine offices, designate departments and department head titles, and positions under his/her jurisdiction, with the approval of the City Council in each instance; however, nothing herein contained shall apply to the City Clerk, City Treasurer, or City Attorney; provided further the authority given the City Manager under the terms of this paragraph shall be subject to any Civil Service or Personnel System now or hereafter established by ordinance; (Ords. 227, 94-5)

(C) To exercise control over all departments and divisions of the City Government and overall appointive officers and employees thereof subject to the approval of the City Council; (Ord. 227)

(D) To attend all meetings of the Council, except when his removal is under consideration, unless excused therefrom by the Council; (Ord. 227)

(E) To recommend to the Council such measures and ordinances as he deems necessary or proper; (Ord. 227)

(F) To serve as Purchasing Officer of the City and have the responsibility as such to make all purchases. The City Manager may delegate the duties of Purchasing Officer to other city employees; (Ords. 227, 687, 1001)

(G) To serve as Personnel Director under the Personnel Merit System in the absence of the Personnel Director or, if both the City Manager and Personnel Director are absent, the City Manager may delegate the functions of the Director to a city employee; (Ords. 763, 813)

(H) To approve all warrants drawn upon the City Treasury before they are presented to the City Council; (Ords. 227, 687)

(I) To serve as Director of Civil Defense; (Ords. 227, 687)

(J) To consolidate departmental budget requests and prepare budgets for Council review and adoption; to be responsible for administration of the government of the City; (Ords. 227, 687)

(K) To investigate all complaints in relation to all matters concerning the administration of the government of the City; (Ords. 227, 687)

(L) To investigate all complaints made to the City with regard to services maintained by public utilities in the City, to ensure that the provisions of franchises, permits, privileges, and contracts granted by the City are faithfully observed; (Ords. 227, 687)

(M) To perform such other duties as may from time to time be delegated to him by the Council; (Ords. 227, 687)

(N) To prepare and recommend to the City Council a salary plan for appointive department heads; (Ord. 763)

(O) To prepare and submit to the City Council an organization chart showing the organizational plan for all departments of the City Government; (Ord. 227)

(P) To devote his entire time to the duties and interests of the City. (Ord. 227)

§11205. Adoption of Rules, Regulations, Policies and Procedures Relating to Personnel Matters.

(a) The Personnel Rules shall be permanent in nature and contain the procedures for putting into effect, expand, explain, and carry out those provisions of the merit system relating to, but not limited to, the civil service status of employees including the classification, recruitment, examination, certification, appointment, promotion, demotion, transfer, performance evaluation, discipline, layoff, and termination of employees, and their right to be heard in their own behalf through grievance and appeal processes.

§11304. Exempt Service.

(a) The following are to be assigned to the Exempt Service:

(1) Elective offices

(1.1) City Clerk

(1.2) City Treasurer

(2) Appointive Positions

(2.1) City Manager, Assistant City Manager, and their secretaries

(2.2) City Attorney, his deputy, and Assistant City Attorney

(2.3) All Heads of Departments except the Chief of Police

(2.4) Deputy City Clerk and Deputy City Treasurer

(2.5) Receptionist Clerk

(2.6) Construction Inspectors (These positions shall be placed in the competitive service at such time as the present incumbents qualify for probationary appointment by competitive examination, or when the position next becomes vacant.)

(3) Special Positions

(3.1) Members of appointive boards, commissions and committees.

(3.2) Persons engaged under contract to supply expert, professional, or technical services for a definite period of time.

(3.3) Voluntary personnel who receive no regular compensation from the City.

(b) The provisions of this Chapter, Personnel Rules, personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters shall apply to all offices, employments and positions in the service of the City except those in the Exempt Service. However, the provisions of this Chapter, personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters pertaining to hours of work, overtime, vacations, sick leave, and holidays shall apply to all fulltime exempt positions, except for those in Special Positions. Further, that those appointed to fulltime exempt positions may participate in promotional examinations as provided by the Personnel Rules if the recruitment standards of the class are met. Also,

the provisions of Section 11311 shall apply to all but elective offices.

§11306. Competitive Service.

All positions other than those assigned to the Exempt Service or Limited Service are to be regular positions and assigned to the Competitive Service.

§11307. Appointments.

(a) Appointments to vacant positions in the Competitive Service shall be based on merit and fitness to be ascertained so far as practicable by competitive examination. Appointments shall be made by the Council, the City Manager, or by the officer in whom the power to make appointments is vested by this Chapter or by law.

(b) When appointment is to be made to a vacancy in the Competitive Service, the names of eligible persons willing to accept appointment shall be transmitted by the Personnel Director to the appointing authority in the order in which they appear on the lists and as provided in the Personnel Rules.

(c) The appointing authority for positions in the Competitive Service shall be the head of the department in which the position exists. Such appointments shall be subject to approval by the City Manager.

(d) In the absence of appropriate employment lists for a position in the Competitive Service, a provisional appointment may be made by the appointing power of a person meeting the qualifications for employment for the position. An employment list shall be established within six (6) months for any regular position filled by provisional appointment. No person shall be employed by the City under provisional appointment for a total of more than six months within any fiscal or calendar year (except that the Personnel Director may, with approval of the Personnel Board, extend the period of any provisional appointment not to exceed an additional six (6) months.) No special credit

shall be allowed in any examination or the establishment of any employment or promotional lists for service rendered under a provisional appointment.

(e) Limited Service appointments to temporary, part-time, student-trainee, and seasonal positions may, but need not, be made from eligible lists and those appointed shall not be in the Competitive Service. Appointments of this type shall include short-term employment for the replacement of employees on leave of absence or vacation, to meet work load peaks or emergencies, or for student-trainees or for work seasonal in nature.

(f) During the period of suspension of any employee, or pending final action or proceedings to review the suspension, demotion or dismissal of an employee, the vacancy created may be filled by the appointing authority only by temporary appointment.

(g) Any employee in the Competitive Service promoted, demoted, or transferred to a position not included in the Competitive Service shall return to the position and status from which he was promoted, demoted, or transferred upon removal from the exempt position unless he is dismissed for cause.

(h) The Council, City Manager, or any other officer in whom the power to make appointments is vested shall, within his jurisdiction, also have the power to make transfers, promotions, demotions, re-employments, reinstatements, layoffs, and to suspend or dismiss employees, and shall retain such powers subject to the provisions of this Chapter and the Personnel Rules.

§11308. Examinations.

(a) All applicants for positions in the Competitive Service shall be subject to an appraisal of their qualifications as provided in the Personnel Rules.

(b) Examinations may be specified by the Personnel Director as promotional only, as open only, or as both open and promotional. It shall be the policy of the Personnel

Director and the Personnel Board to encourage the general practice of promotion within the City service whenever in their view a sufficient number of fully qualified candidates are available and such policy will continue to contribute to a sound and efficiently operating City organization.

§11309. Probationary Period.

The probationary period is to be considered and used as continuation of the examination and selection process.

(a) All original and promotional appointments shall be for a designated probationary period of not less than six months nor more than two years as provided in the Personnel Rules concerning the class. During the probation period the employee may be rejected by the appointing authority at any time without right of appeal or hearing.

(b) An employee rejected during the probationary period from a position to which he has been promoted shall return to the position and status from which he was promoted, unless the reason for rejection would have been sufficient to cause his dismissal from his former position as well. In such case, the employee shall be entitled to appeal his dismissal as provided in this Chapter.

(c) An employee's status shall be considered permanent upon completion of the probationary period only if the appointing authority reports to the Personnel Director prior to the end of the designated probation period that the services of the employee have been satisfactory and that the employee is recommended for a permanent appointment. Otherwise, the Personnel Director is to initiate procedures to have the probationary employee released from his probationary appointment prior to the end of its term. Once an employee satisfactorily completes a probationary appointment and thus attains permanent status in a class, this status is retained until status is acquired in another class or until employment is terminated as provided in this Chapter and the Personnel Rules.